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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

Nos. 510 - 511

MARKET STREET RAILWAY COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, et al., etc.

Appeals from the Supreme Court of the State of California

BRIEF FOR APPELLANT.

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RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the Members of and Constituting the Railroad Commission of the State of California,
Appellees.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of California (R. 598) is reported at 24 A.C. 377, 150 Pac. (2d) 196. The opinion of the Railroad Commission of the State of California (R. 59) is reported at 45 C.R.C. 53. The opinion of the Railroad Commission on the order denying a rehearing (R. 114) is reported at 45 C.R.C. 162.

JURISDICTION.

The decision and judgment of the Supreme Court of California was rendered July 1, 1944 (R. 598, 623, 624). A petition for rehearing was denied July 27, 1944 (R. 623).

The federal questions were appropriately raised and preserved in the record. The invalidity of the Commission's order under the due process clause of the Fourteenth Amendment was urged at the first opportunity in appellant's petition for a rehearing before the Railroad Commission (R. 105, 106, 107 and 109), and likewise in the petition for writ of review in the Supreme Court of California (R. 1, 4, 5 and 8). Both the Commission (R. 115-116, et seq.) and the court below (R. 599, et seq., 621, 622) passed upon the federal questions and the court below sustained the validity of the Commission's order.

In No. 510, the appeal was allowed July 31, 1944 (R. 630).

In No. 511, the appeal was allowed September 20, 1944 (R. 646).

Both appeals are from the same judgment. On the merits they present identical questions. The jurisdictional problem that led to the taking of two appeals in the same case is discussed in our statement as to jurisdiction on the appeal in No. 511.

If it be held that the judgment in the case at bar was final when filed and that the time for appeal then commenced to run, it would appear appropriate to dismiss the appeal in No. 511. It is believed that the decisions in *Dept. of Banking v. Pink*, 317 U. S. 264, and *Cole v. Violette*, 319 U. S. 581, support such action. If, on the other

hand, it be held that the judgment became final on August 1, 1944 (thirty days after its filing) and that the time for appeal then commenced to run, it would appear that the appeal in No. 510—having been taken before the judgment sought to be reviewed became final—was premature and should be dismissed.

See

Ohio Pub. Serv. Co. v. Fritz, 274 U.S. 12;

United States v. Crescent Amusement Co., Nos. 17, 18 and 19, October Term 1944, decided December 11, 1944, ... U. S. ....., 65 Sup. Ct. 254, 256-257.

APPROPRIATE DISPOSITION OF THIS CASE IN THE LIGHT OF EVENTS OCCURRING SINCE THE RENDITION OF THE ORDER OF THE RAILROAD COMMISSION AND OF THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

Another matter, closely related to jurisdiction, should at the outset be called to this Court's attention. At the time these proceedings were instituted appellant was a public utility street railway company operating in the City and County of San Francisco and the County of San Mateo. It was subject to the jurisdiction of the California Railroad Commission under the provisions of the California Public Utilities Act.[1] These appeals attack the validity of an order of this Commission directing appellant to reduce its San Francisco base cash fare from 7 cents to 6 cents (R. 91). On September 29, 1944—after the decision of the Supreme Court of California sustaining this

[1]Cal. Stats. 1915, p. 115, as amended (Deering's California General Laws, Act No. 6386).

rate order and after allowance of both appeals herein—all appellant's franchises were canceled and its operative properties acquired by the City and County of San Francisco. These properties are now part of the San Francisco Municipal Railway system and are being operated under a uniform 7-cent fare. The municipal system is not subject to the jurisdiction of the Railroad Commission of the State of California.[2] Since the challenged order has been stayed pending review, the result of this transfer of the properties is that the order can never become operative. The case is not moot, for upon its final determination depends the disposition of a substantial fund accumulated under the stay orders.[3] Nevertheless, acquisition of the opera-

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[2] *U. S. v. San Francisco*, 310 U.S. 16, 27, footnote 20, and authorities cited.

[3] The sale of appellant's properties, occurring after the allowance of the appeals herein, does not appear of record. The record shows that the order of the Commission has been stayed pending appeal (R. 631), but since further facts were not pertinent until the sale of the properties occurred, the terms of the stay orders were not included in the record. In order that this Court may be fully advised of the status of the case at the present time, we append to this brief the following documents:

"Exhibit A," a copy of the order of the Supreme Court of California, dated March 8, 1944, duly certified by the Clerk of that court, staying the order of the Commission and providing for the filing by appellant with the court below of an undertaking in the amount of $100,000 and for the deposit by appellant of additional amounts necessary to secure the payment by appellant of the 1-cent difference between the 6-cent and 7-cent fare in the event the order of the Commission ultimately should be sustained.

"Exhibit B," a certificate of the Clerk of the Supreme Court of California showing the amounts deposited by appellant pursuant to the order of the California Supreme Court—aggregating $603,319.53 in addition to the undertaking of $100,000.

"Exhibit C," a copy of the contract between appellant and the City and County of San Francisco, dated September 14, 1944, for purchase of appellant's properties.

"Exhibit D," a copy of the amendment to the charter of the City and County of San Francisco, approved by the voters at a

tive properties by San Francisco raises certain questions as to the right disposition of these appeals.

As we show hereafter,[4] the Commission conceded that if appellant were compelled to operate under a 6-cent fare and if, in addition, it were to carry at this fare the same number of passengers it carried under a 7-cent fare, it would operate at an out-of-pocket loss. However, the Commission based its order upon its expectation that there would be a substantial increase in the number of passengers under a 6-cent fare. On the basis of this expectation and of certain assumptions as to greatly increased revenue and slightly increased expense, the Commission concluded that appellant would be able to operate at a profit under the 6-cent fare.[5]

It is now certain that the anticipated stimulation of traffic cannot take place, for the 7-cent fare was collected to the end of appellant's operations and has been continued in effect under municipal operation. It is also certain that if appellant is compelled to pay over the difference between the 7-cent fare collected and the 6-cent fare ordered, it will suffer a large operating loss for the period from the effective date of the order to the date of the sale

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special election on May 16, 1944, authorizing the acquisition of appellant's properties.

"Exhibit E," a copy of pertinent portions of Assembly Concurrent Resolution No. 3, Chapter 13 of Resolutions, Fifty-fifth (Fourth Extraordinary) Session, California Legislature, approving the amendment to the charter of the City and County of San Francisco.

[4]Infra, pp. 39, et seq., 66-67.

[5]Infra, p. 39 et seq.

of its properties.[6] It is, of course, recognized that the stay of the Commission's order was obtained by appellant. But the unusual feature of this case is that the 6-cent fare order was purely an experimental order, and the sale of appellant's properties has eliminated any possibility of adjustment in any future operations. The order was characterized by the Commission and its members as an "experimental" order, "primed with the element of conjecture" and subject to "necessary adjustments" "should the experiment fail of its objective" (R. 90, 103-104). As stated by the Commission (R. 90):

> "We think a decrease at this time should also be gradual and must of necessity be experimental. We shall, at this time, reduce the Market Street Railway Company fare by only one cent and fix a six-cent cash fare as an interim rate."

Further, as stated in the concurring opinion of Commissioners Baker and Craemer (R. 103-104):

> "It is * * * obvious that, during such experimental period, the volume of traffic on the Market Street Railway system must be materially increased, for otherwise the proposed plan cannot effect a solution of the problem. Such increase in the volume of traffic, of course, will necessitate an increase in the frequency of the service, which, in turn, will require both additional equipment and additional manpower, with attendant increase in the cost of operations. All this may be achieved, with attendant benefit to both the

[6]Appellant is prepared to show that if it is compelled to account on the basis of a 6-cent fare during the period from the effective date of the order (March 1, 1943) to the date of the sale of its properties (September 29, 1944), it will have suffered an actual operating loss during that period of $356,936.78.

transportation agency and the patronizing public. On the other hand, the result may be wholly negative with reference to the desired end. It is thus primed with the element of conjecture.

• • • Furthermore, should the proposed plan prove ineffective, the necessary adjustments to follow would be much more simple, from the standpoint of procedure, and involve much less expense, if the experimental process were subject to a definitely defined period."

Another unusual feature of this case is that the people of San Francisco, in connection with the purchase of the Market Street Railway, established the 7-cent fare on the entire combined municipal street railway system (see Exhibits C, D and E, Appendix, pp. 8, 20 and 29).

It may be doubted whether the Railroad Commission would have made its fare reduction order had it known that within a few months appellant's franchises would be canceled, its operations cease, the so-called experimental period end, the opportunity for making any "necessary adjustments" pass away, and the people of San Francisco establish a uniform 7-cent fare on all lines.

Compare *Bronx Gas & Electric Co. v. Maltbie*, 271 N.Y. 364, 3 N.E. (2d) 512, sustaining the constitutionality of the temporary rate provisions of the New York Public Service Law on the ground that the utility is protected by the provision requiring recoupment under the final rate.

And see *Driscoll v. Edison Co.*, 307 U.S. 104.

In this situation precedent exists under which this Court might vacate the judgment of the court below and the

order of the Commission and remand the cause to the Commission for such further proceedings and order as the Commission shall determine to be appropriate in the light of the changed circumstances.

See

N. Y. ex rel. Whitman v. Wilson, 318 U.S. 688, 690-691;

Patterson v. Alabama, 294 U.S. 600, 607.[7]

In *Marshall v. Bush*, 102 Neb. 279, 167 N.W. 59, a case involving an order of the state railroad commission requiring certain additional services by a railway company, the Supreme Court of Nebraska took the following action (167 N.W. 59, pp. 61-62):

> "Since the rendition of the order complained of a condition has arisen of which the court is justified in taking judicial notice. The country is now in a

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[7]In the *Patterson* case this Court said (294 U.S., p. 607):

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a nonfederal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case."

Compare *Fly v. Heitmeyer*, 309 U.S. 146, and *Federal Comm'n v. Broadcasting Co.*, 309 U.S. 134, where this court pointed out that on a second hearing on an application for a broadcasting permit the commission properly considered changes in circumstances arising since its original decison.

state of war, and the government of the United States has assumed control over the operation of the railroads. There is a deficiency in motive power and of cars, and a shortage of men. To take the necessary engines and rolling stock to operate this train may decrease to that extent the facilities of defendant for the patriotic duty which is imposed upon it of doing everything possible to meet the demands in the transportation field imposed by the new conditions. Without deciding that the order was unreasonable when made—though inclined to so hold—we are reluctant to sustain it under these circumstances. We have concluded that the order should remain in abeyance until an opportunity is given to the Railway Commission to consider how far the order may impinge upon the powers given by Congress to the Director General of Railways over the operation of the railroads during the war, and whether under the present conditions the order should not be vacated. The order is set aside and the matter remanded to the state Railway Commission for further hearing and consideration."

A similar decision is *Ralston Business Men's Ass'n v. Bush*, 102 Neb. 446, 167 N.W. 727.

This Court has commented in a number of cases on the undesirability of allowing court proceedings to delay for unreasonable periods the operation of rate orders promulgated by commissions having jurisdiction over public utilities. The acquisition by San Francisco of appellant's properties, and the establishment by the City of a uniform 7-cent fare on all lines, eliminates any such element from this case.

Under the law of California the Commission has power to rescind, alter or amend any order or decision made by it.[8]

We believe and submit that this Court should pass upon the merits of the case at this time, thus minimizing litigation costs and effecting an early termination of the controversy for a company whose revenues have ceased. For reasons now to be set forth, we submit that the decision is clearly erroneous. We have, however, deemed it incumbent upon us to call the above situation to the attention of this Court.

STATEMENT OF THE CASE.

Appellant is a public utility street railway company incorporated in 1893 (R. 174). In 1920 it was an inactive subsidiary of United Railroads of San Francisco, the then operating company.[9] United Railroads had outstanding $42,948,600 of stock and $39,242,000 of notes and bonds. It was unable to meet maturities of principal and interest and was reorganized with the approval of appellee Commission.[10] The operating properties were conveyed to

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[8]Public Utilities Act of California (Deering's California General Laws, Act 6386) section 64:

"*Power to rescind, etc., orders.* The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions."

[9]*In the Matter of the Application of The United Railroads of San Francisco*, 19 C.R.C. 180.

[10]Ibid., pp. 181-188.

appellant. With the approval of the Commission, appellant issued

5% bonds due September 1, 1924	$10,166,000.00
6% notes due September 1, 1924	5,200,000.00
6% prior preference stock	11,750,000.00
6% preferred stock	5,000,000.00
6% second preferred stock	4,700,000.00
Common stock	10,700,000.00
Total	$47,516,000.00[11]

In 1924, with the Commission's approval, the notes and bonds were refinanced by $15,000,000 of first mortgage 7 per cent bonds.[12] In 1940 the Commission approved a supplemental arrangement extending maturity and reducing interest to 5 per cent.[13] At the end of 1942 the following of these securities were outstanding:

First mortgage sinking fund 5% gold bonds	$ 4,217,500.00
6% prior preference stock	11,618,500.00
6% preferred stock	4,986,850.00
6% second preferred stock	4,673,700.00
Equipment notes	735,748.28
Common stock	10,647,400.00
There was also an additional long term debt of	1,041,625.68
Total	$37,921,323.96[14]

[11] Ibid., p. 185.

[12] *Application of Market Street Railway Company*, 24 C.R.C. 464.

[13] *Application of Market Street Railway Company*, 42 C.R.C. 211; Exhibit 19, R. 287, in evidence, R. 486.

[14] Exhibit 2, R. 151, 152, notes 2 and 3; in evidence, R. 375.

Appellant's operations are in San Francisco and San Mateo Counties.[15] In San Francisco it competes with the city-owned San Francisco Municipal Railway System, which began operations in 1912.[16] Ever since that time there has been more or less continuous agitation for the purchase of appellant's properties by the City for municipal operation, and numerous negotiations have taken place.[17] In September 1942 and again in March 1943 appellant's directors passed a resolution approving the action of appellant's president in negotiating the sale of appellant's operative properties to the City and County of San Francisco for $7,950,000 and authorizing him to take necessary and proper steps to complete the proposed sale.[18] In neither instance, however, was the proposed sale approved by appellant's stockholders or by the voters.[19]

For many years appellant has been in a desperate financial condition (R. 557). No dividends have been paid on prior preference stock since January 1, 1924. No dividends have ever been paid on the preferred, second preferred or common stock.[20] Until the beginning of the present war boom, which has brought relief "purely temporary in nature" (R. 558), it has been faced with steadily diminishing revenues for a period of about 15 years.[21] For more than 10 years prior to 1942 it "enjoyed no credit, it was

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[15]Exhibit 10, R. 165, 166A; in evidence, R. 441.

[16]Exhibit 10, R. 165, 175; in evidence, R. 441.

[17]Exhibit 10, R. 165, 176; in evidence, R. 441; R. 412-413.

[18]Exhibit 8, R. 163; in evidence, R. 433; Exhibit 9, R. 164; in evidence, R. 434.

[19]Exhibit 10, R. 165, 176; in evidence, R. 441.

[20]Exhibit 24, R. 316, 318; in evidence, R. 555. This exhibit discloses the situation to 1938. The profit and loss (surplus) account in Exhibit 2 (R. 151, 154-155; in evidence, R. 375) shows that no dividends have been paid since that time.

[21]Exhibit 10, R. 165, 182; in evidence, R. 441.

powerless to borrow money anywhere, so the only way it could finance itself was by ceasing to pay its current bills for electrical energy to operate its system, which it purchased from Pacific Gas and Electric Company * * *. The debt at its maximum reached a figure of well over $600,000 which the Company was unable to liquidate in its entirety until March or April of this year [1943]" (R. 557).

During the depression of the 30's, the operating income ran less than half of what it had been (R. 83). Expenses had increased, particularly wages.[22] In 1937 the Commission considered appellant's application for increase in fares and held that an increase was necessary.[23] Various arrangements were suggested and tried, and ultimately the Commission settled on a schedule providing, among other rates, for a 7-cent fare in San Francisco, other than on interurban cars.[24]

No valuation study of appellant's properties has been made since 1920, at which time the engineering department of the Commission prepared an historical valuation of the properties as of June 30, 1920. The present record contains no study of values. It does show, however, that as of December 31, 1942, the book value of appellant's properties was $41,768,505.20,[25] its capitalization $37,921,323.96.[26] The Commission in its 1920 study found the historical reproduction cost of road and equipment as of June 30, 1920, to be $29,715,147.[27] This valuation,

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[22]40 C.R.C. 526-528.

[23]40 C.R.C. 525, 531; Exhibit 10, R. 165, 177; in evidence, R. 441.

[24]41 C.R.C. 651; Exhibit 10, R. 165, 177; in evidence, R. 441.

[25]Exhibit 10, R. 165, 243, 244-245; in evidence, R. 441.

[26]See p. 11, supra.

[27]Exhibit 10, R. 165, 243; in evidence, R. 441.

brought forward to December 31, 1942, by adding additions and betterments and deducting retirements, shows a total amount for road and equipment of $25,343,543.[28]

The instant case originated before the Railroad Commission by an order, made on the Commission's motion, instituting an investigation "into the reasonableness of the rates, charges, classifications, rules and regulations of the Market Street Railway Company, and also into the reasonableness, sufficiency and adequacy of the operations, service and facilities of said company" (R. 56). Although this order referred generally to rates, along with the many other matters mentioned therein, the Commission announced at the first session that this hearing would deal with matters relating to appellant's service (R. 393), and appellant was specifically directed to produce evidence on that issue (R. 395; and see p. 19, et seq., infra). The evidence at the hearing—which covered only two and one-half days—was directed to service problems. At no stage in the proceedings was any issue formulated with respect to rates; at no stage was there any definite complaint or allegation that any rate was unreasonable; at no time prior to the decision did the Commission advise appellant that its rates were in issue, or under attack, or that any change in them was proposed. Discussions and testimony as to the type of order the Commission might be expected to enter related solely to service (infra, p. 19, et seq.).

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[28]Exhibit 10, R. 165, 243, 246-247; in evidence, R. 441.
There is passing mention in the record of a report prepared in 1929 by Mr. O'Shaughnessy, City Engineer of San Francisco, which found the reproduction cost new of appellant's depreciable property to be $42,679,000 as of June 30, 1928 (Exhibit 10, R. 165, 251; in evidence, R. 441).

After the hearing the Commission filed an order directing appellant to reduce its San Francisco base fares from 7 cents to 6 cents (R. 91).

The Commission's decision is unusual.

The decision opens with a short history of the Market Street lines (R. 60-63) and then turns to the question of service, which it characterizes as the "principal issue at this time" (R. 64), and to the "matter of manpower shortage," which it says also "occupies an important place in this proceeding" (R. 73). It finds that the company's service to the public is bad and could be improved (R. 81). It then quotes a number of authorities for a theory of rate making which is nowhere clearly defined but seems to be that the rate should be fixed at a figure considered by the Commission to be equal to the "value of the service." The standard of "value" is not defined, but the Commission apparently had in mind such factors as whether cars are too crowded, equipment insufficiently modernized, etc. (R. 76-82).

Apparently being uncertain that a rate reduction order could rest on "value of service" alone, however, the Commission finally turned from this theory and based its order upon its conclusion that under a 6-cent fare appellant would earn a return of 6 per cent upon the fair value of its property (R. 91). In arriving at value the Commission looked only at the resolutions of appellant's board of directors authorizing the sale of appellant's properties to San Francisco for $7,950,000, and held that this amount is the maximum present fair value of appellant's properties for rate-making purposes (R. 87, 89).

In determining the rate of return on this base figure of $7,950,000, the Commission assumed that appellant under the 6-cent fare would have a gross annual operating revenue of $8,500,000 and operating expenses of $8,000,000, leaving a net operating income of about $500,000 (R. 91). These figures appear nowhere in the record and can be derived from no figures in the record. They are based upon no evidence. They are the Commission's own expectations.

The Commission's original decision (R. 89-90) and its decision denying a rehearing (R. 136) indicated that it had based the above expectations of revenue and expense upon its expectation of an increase in traffic in some unstated amount. However, it was not until the Commission filed its answer to appellant's petition for review in the court below that appellant was advised by the Commission that it had based its estimates upon an expectation of an increase of approximately 10 per cent (R. 20, 40). As we show hereafter (infra, pp. 41-43), the Commission later was compelled to revise even this delayed computation and admit that its expectation must have been of an increase in traffic of 13.91 per cent. At the same time, the Commission's expectation was that operating revenues would increase less than 1 per cent (infra, p. 44). No one of these figures appears in or can be derived from evidence in the record. There is no evidence of the estimated traffic that would or might be expected to move under the 6-cent fare, of the estimated revenue from that traffic, of the estimated expense of handling that traffic.

In reaching its conclusions the Commission relied upon certain figures given by it as the operating revenues of

appellant during the eight-month period, January to August, 1943 (R. 87). There is no evidence in the record which shows appellant's operating revenues after May, 1943. In its briefs in the court below the Commission "frankly admitted" that it had taken its figures from operating reports of appellant not in evidence.

The majority opinion and order, just summarized, was signed by three of the five members of the Commission (R. 92). One of these three also filed a concurring opinion (R. 92). He was even more uncertain of the validity of the "'value of the service" basis for fixing rates and expressed the view that while the rate must bear a "reasonable relationship to the quality and character of * * * service," another test is "required" (R. 93), namely, "The Commission may not fix a rate resulting in confiscation of the company's property used and useful in the public service." Purporting to apply this test, the concurring Commissioner concluded, on the basis of the same expectations as had been expressed in the majority opinion, that the 6-cent fare would not be confiscatory.

The remaining two Commissioners specially concurred in the Commission's order "upon the distinct understanding that such fare reduction is to be deemed experimental in character under war-time conditions" (R. 103). They emphasized that "necessary adjustments" would have to be made "should the proposed plan prove ineffective" (R. 104). They stated emphatically (R. 104):

> "* * * be it known that we are in disagreement with the majority opinion with respect to certain of the reasoning processes therein noted, as well as to a number of the assumptions and deductions thereof,

and also with reference to the relevancy and the application of some of the cases therein cited in support of the line of reasoning of the majority opinion."

Appellant promptly filed a petition for rehearing (R. 105), pointing out that the order is invalid because made without notice or opportunity for a hearing on the issue of rates; because it is without support in the evidence and is based upon the Commission's unsupported assumptions and expectations; and because it is confiscatory. The petition prayed that appellant be given an opportunity to present evidence on the reasonableness of its rates (R. 112-113).

The petition was denied by the vote of the three members who signed the majority opinion (R. 140).

In accordance with section 67 of the California Public Utilities Act[29] appellant filed a petition for a writ of review in the Supreme Court of California, repeating its claims that the order is invalid under the due process clause of the Fourteenth Amendment (R. 1). The writ issued (R. 46, 47) and in response thereto the Commission certified for review the entire record in the case (R. 49). That record is before this Court.

The Supreme Court of California gave only passing mention to appellant's principal contentions. Virtually all of its opinion is devoted to a justification of the use of the figure of $7,950,000 as appellant's rate base (R. 606-620), a question, as we emphasized below and as we hereafter point out, of subordinate importance in this proceeding. The court intimated approval of the

[29]Deering's California General Laws, Act 6386, section 67.

Commission's "value of service" theory (R. 621, 622), but held (R. 622):

> "The problem of the value of the service, and the correctness of the commission's decision on the consumer interest, do not involve constitutional questions, so long as otherwise the investor or company interest has received adequate consideration by the commission. * * *
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> * * * It does not appear from the facts in this record that the rate fixed by the commission is so unreasonably low as to call for a declaration that Market Street Railway Company has been deprived of its property without due process of law or without just compensation."

SPECIFICATION OF ERRORS.

Appellant specifies assigned errors Nos. 1 to 11, inclusive (R. 626-629) as the errors intended to be urged.

ARGUMENT.

I.

THE ORDER IS INVALID UNDER THE DUE PROCESS CLAUSE BECAUSE IT WAS ENTERED WITHOUT NOTICE TO APPELLANT THAT ITS RATES WERE UNDER ATTACK AND WITHOUT AFFORDING APPELLANT AN OPPORTUNITY FOR A HEARING ON THE ISSUE OF THE REASONABLENESS OF ITS RATES.

Neither appellees nor the court below deny that procedural due process requires notice and opportunity for hearing, that in an administrative proceeding the defendant is "entitled to be fairly advised of what

the Government proposes and to be heard upon its proposals before it issues its final command," and that the "right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

Morgan v. United States, 304 U.S. 1, 18-19;
West Ohio Gas Co. v. Comm'n (No. 1), 294 U.S. 63, 68.

The only dispute is whether this record shows that appellant was accorded these rights.

In this brief we can only summarize the record. This we shall do sufficiently to demonstrate the validity of our contention, though no summary can be as convincing as the record itself. The reading of the transcript of the hearing (in which all exhibits are summarized) will bring conviction that appellant was denied the fundamentals of a fair hearing. Not only was no issue drawn as to the reasonableness of appellant's rates, but the Commission specifically formulated an entirely different issue—the adequacy of appellant's service. It directed appellant to devote its evidence to that issue; confined the testimony of its own witnesses, as they themselves state, to that issue; and over and over again indicated that its order, if any, would deal with that issue.

The proceedings were instituted by the Commission on its own motion (R. 56). "It thereby assumed full responsibility in the premises, including the burden of proof."[30] It is true that the order instituting the investigation describes the investigation as one "into the reasonableness

[30]Concurring opinion of Commissioners Baker and Craemer (R. 104).

of the rates, charges, classifications, rules and regulations of the Market Street Railway Company, and also into the reasonableness, sufficiency and adequacy of the operations, service and facilities of said company" (R. 56, 366). It is true, also, that the Commission's president read the caption at the outset of the hearing (R. 366). But this caption and this order, in broad and conventional form, covering almost every conceivable issue relating to appellant's affairs, were not sufficient in themselves to apprise appellant of any charges against it. They differ in no substantial respect from the order instituting the *Morgan* proceeding, which this Court held did not constitute the "concrete statement of the Government's claims" to which a litigant is entitled (*Morgan v. United States*, 304 U.S. 1, 19). Further, in this case the subsequent proceedings made clear that of the many matters mentioned in the order, appellant's service was the point in issue.

The first day's hearing lasted a couple of hours (R. 366-400). Three Commission witnesses were called. Mr. Hunter identified and summarized a comparative income statement[31] of appellant and of the San Francisco Municipal Railway (R. 367-374; 376-378). Mr. Donovan identified and summarized Exhibit 2[32] consisting of a comparative balance sheet and other financial statements of appellant for the years 1938 to 1942 (R. 374-376). It was then stipulated that appellant's annual reports for the years 1938 to 1942, and monthly reports from 1938 to May, 1943, should be deemed a part of the record (R. 378). Mr. Hall testified concerning the condition of appellant's tracks

[31]Exhibit 1, R. 142-150; in evidence, R. 374.
[32]R. 151-158; in evidence, R. 375.

from the standpoint of safety and riding qualities (R. 379-380), its track maintenance methods (R. 380), its equipment, rolling stock, repair methods and operations (R. 381-385), and car loadings (R. 386-388), and its performance in maintaining schedules (R. 388). He identified Exhibits 3 to 6[33] covering these matters. At the conclusion of this testimony, counsel for the Commission asked the witness whether, as a result of his studies, he had "any general comment to make on the service of the Market Street Railway" (R. 391). The witness replied with recommendations (R. 391). Counsel for the Commission then said that the staff had no further evidence at that time, but intended to make additional studies.

Up to this point certainly there was no indication that the Commission was investigating the reasonableness of appellant's rates.

Thereupon the following occurred (R. 393-395):[34]

"Commissioner Havenner. Has the Company anything to offer at this time?

Mr. Appel. We haven't anything at this time, Mr. Commissioner.

Commissioner Havenner. Mr. Holm, does the City intend to offer any evidence or testimony in this proceeding, or are you prepared to offer anything at this time?

Mr. Holm. No, if the Commission please, we have no thought of presenting anything to do. *I do not know exactly what scope this investigation might*

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[33]R. 159, 160, 161; in evidence, R. 382, 385, 387.

[34]Italics in the brief are ours unless otherwise indicated.

take. We do not deem it necessary to make any studies at the present time, at least.

* * * * * * *

Commissioner Havenner. *Well, of course, this investigation was undertaken with the hope that it might result in some improvement of the public transportation for the people of San Francisco* and the investigation will be very broad in its scope *and will go to almost every aspect of that question* as it affects the operations of the Market Street Railway Company.

* * * * * * *

Commissioner Havenner. I would like to ask the staff if they think that the City could participate in this investigation in any way to their advantage?

Mr. Brown. Yes, I think so, very much. *I think there are a great many service matters that could be considered in conjunction with the Company and the City and the Commission.* It would not take, probably, very long to consider, I think it would be very helpful if we could have the cooperation of the City.

Mr. Holm. If you would be good enough, Mr. Brown, to indicate what service studies you would desire the Municipal Railway representatives to undertake I feel certain that they would more than gladly cooperate and supply you that promptly.

* * * * * * *

Commissioner Clark. I would like to make this observation: It is my opinion as a Commissioner that in discussing this matter the City of San Francisco administrative officers do it not only considering themselves operators of a competitive railroad, you might say, but also, in addition to that, entirely aside from that, as representing the public interest of the City of San Francisco *to join with this body in try-*

ing to do everything possible to improve the service, whether that is operation of the two operations from the standpoint of a practical convenience to the public, or not, or whatever it might be, I think that this Railroad Commission, at least, I am as an individual Commissioner, interested in seeing ways and means carried through at the earliest possible date that will result in improving the system for operating • • •."

Commissioner Sachse then turned to Mr. Kahn, the president of the Market Street Railway, and said (R. 395-396):

"Commissioner Sachse. *I think the Commission would be interested, at least I would, Mr. Kahn, in what program, if any, the Railroad has of an improvement of service or putting this unused equipment into service, rehabilitation of those portions of the system that need rehabilitation, and particularly with reference to the deferred maintenance that seems to be in everybody's mind.*

A statement or presentation from the Company of what the Company itself proposes to do, aside from anything that the Commission may want to recommend or order later on.

Mr. Kahn. You want a statement now or at the time we present our case?

Commissioner Sachse. I would like at this time, in view of the work ahead, *I would like to know what the Company's program or what you propose to present to the Commission now or later.*

Mr. Kahn. Well, if the Commission please, I cannot state precisely what our presentation will be; it will depend somewhat upon the exhibits offered in this case by the Commission itself, the Commission's engineers."

Mr. Kahn then discussed a number of matters relating to service, and Commissioner Sachse continued (R. 396-397):

"Commissioner Sachse. * * * Are you making any or do you contemplate making any financial provisions for deferred maintenance?

Mr. Kahn. We have no definite program of setting aside anything for maintenance. We think our first obligation is to discharge our debts; it was money honestly borrowed and we want to honestly repay it. Having gotten our debts out of the way we feel that we will then be in shape to refinance when the war is over or perhaps sooner so that we can improve our service generally, and when I say, 'improve' I mean improve in the broadest sense. That covers both modernization and improvement of present facilities.

Commissioner Sachse. Have you made any estimate of the amount of deferred maintenance or other rehabilitation work, perhaps in steps? What is the most urgent, what is the next most urgent and over what period of time and how much money will be taken for each one of those steps?

Mr. Kahn. Well, I think the most urgent work to be performed is now covered by a contract which we have recently entered into with the City.

Commissioner Havenner. Is that with respect to paving?

Mr. Kahn. Why there is—yes, some paving involved and some other maintenance work involved.

Commissioner Sachse. All this information will be available?

Mr. Kahn. Oh, yes, this is all of record."

Following this the Commissioners addressed a number of inquiries to Mr. Kahn concerning car repairs and manpower problems, and then, speaking of further hearings, the presiding Commissioner said (R. 399):

> "Commissioner Havenner. Well, during the recess I discussed this matter with the other members of the Commission and I can state it was the consensus of opinion that we ought not to delay this matter, Mr. Kahn, unreasonably. *The investigation was started, as I stated, in the hope that it might be productive of some improvement in transportation for the people here during this emergency period in particular,* and I think it is the sense of the Commission that we ought to proceed as expeditiously as we can with our investigation. If the Engineers and other employees of the Company would be willing to cooperate in some of the studies that we are making we would be delighted to have them do so; * * *."

Here in unequivocal terms the Commission formulated the issue, specifically advising appellant what testimony it should be prepared to submit. Not a word was said, not an intimation given, that appellant was to meet a charge that its rates were unreasonable; that the Commission was taking evidence concerning, and contemplated, a rate reduction. On the contrary appellant was led to believe that the Commission had in mind requiring appellant, from its present earnings, to set aside funds for maintenance and rehabilitation after the war. Notice also was fairly given that other methods of improving service were in issue: the Commission intended to go into "almost every aspect of *that* question" (supra, p. 23). Appellant was familiar with the provisions of the

California Public Utilities Act giving the Commission broad powers to order improvements in the service and facilities of public utilities.[35] No possible question could exist in its mind but that these were the matters under consideration.

On July 15th one more day's testimony was taken (R. 400-476). Commission witnesses still testified. Nothing occurred to change the picture.

Mr. Vensano, director of Public Works of the City and County of San Francisco, submitted a report of the obligations of appellant as to the use and condition of the streets, particularly its paving obligations (R. 401-406).[36] The report indicated that it would cost appellant $1,691,162 to bring the paving into proper condition (R. 403).

Commission Engineer Mors (R. 407) summarized and identified Exhibit 10.[37] Although this exhibit is lengthy, its purpose is fairly summarized by the witness (R. 408):

> "The purpose of the report is to present a brief historical summary of the financial results of operation of Market Street Railway Company over the 21 years ending December 31, 1942, with particular reference to the last few years and with some consideration of results for the first few months of 1943."

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[35]These provisions, sections 35, 36, 37 and 42 of the California Public Utilities Act (Deering's California General Laws, Act 6386) are quoted in the Appendix to this brief, p. 31 et seq.

[36]This report was summarized by the witness and received as Exhibit 7 (R. 405). It is a voluminous document before this Court as an original exhibit (R. 639).

[37]Exhibit 10, R. 165-261; in evidence, R. 441

The report is entirely historical. It contains no rate study. The Commission's principal witness, Mr. Hunter, pointed out that neither this report nor any other study made and presented by the Commission analyzes the "rate situation" (R. 467). Much of the report was devoted to comparative studies of appellant and the Municipal line, the interrelation of those two lines being pertinent to any service study. Much also was said about maintenance (R. 412, 435) and depreciation (R. 438). It was noted that the appropriation for depreciation by appellant was insufficient (R. 439-440).

During Mr. Mors' testimony, Mayor Rossi of San Francisco, and Mr. Cahill, Manager of the Public Utilities of San Francisco, arrived at the hearing and were sworn. Mayor Rossi spoke of the efforts of the City to acquire appellant's system (R. 412-418). He was asked if he knew anything that would aid "in taking care of the traffic situation from any adjustment between the operations of the two railways" (R. 415); "that might facilitate operations?" He replied (R. 415):

> "I think that there is an honest effort being made to improve the service. No matter what is done you will never be able to solve the problem until you have a unified system, * * *."

Mr. Cahill was asked whether he had "any suggestions to make to the Commission as to how the present traffic situation may be alleviated, bearing in mind that the Market Street Railway is owned privately and the Municipal Railway owned by the City and County" (R. 419). He said that he also believed consolidation of the two roads

was the only proper solution but, if that were impossible, certain other steps might be taken to improve service and aid in the handling of transportation. He enumerated proposed service changes (R. 421-425, 428-429). He was asked about the City's declared policy of a uniform 5-cent fare for mass transportation, and about universal transfers. He answered that "a uniform fare" and a "universal transfer" are "matters merely of price, they do not affect service" (R. 419): that even a free universal transfer or a uniform 5-cent fare would not materially increase the volume of traffic (R. 431):

> "No, I do not think it would because I think that under the present financial conditions of the people they have money enough, when they want to go somewhere, to pay the two fares and they do it. They do not refuse to go to 3rd and Townsend from out in the Richmond District because it costs 7 cents on the Market Street and 5 cents on the Municipal. They pay it and go. The traffic, I do not believe, would increase very much."

He suggested certain track and equipment leasing arrangements (R. 421-422, 428-429).

Clearly indicative of what everyone considered to be the subject matter of the hearing were the questions directed to this witness by Mr. Holm, Assistant City Attorney of San Francisco (R. 425):

> "Well, for an immediate solving of this problem, *an order of this Commission*, then, directing the Market Street Railway Company to enter into a fair contract with the City for the use of the inner rails by the 'K' and 'L' lines would be a great help, wouldn't it Mr. Cahill?"

and by one of the Commissioners (R. 429):

> "Really what I meant to ask you was, Mr. Cahill, *what do you think this Commission could do* to put this idle equipment, this unused equipment, assuming that it can be necessarily and properly used, into operation?"

Mr. Cahill also stated that at the request of the Commission he had brought with him copies of resolutions of appellant's directors authorizing the sale of its properties to the City and County of San Francisco (R. 432-434). These were introduced as exhibits[38] without comment by any Commissioner, Commission counsel, or anyone else. No possible significance could have been given to them, in the light of Mr. Cahill's and Mayor Rossi's testimony, other than as steps in the history of San Francisco's effort to arrive at a unified operation of the two lines. Emphasizing this is the fact that later, at the opening of appellant's case, counsel for appellant moved to strike these exhibits as "immaterial to any inquiry pending before the Commission and not germane to any issue that has been presented" (R. 481). The president of the Commission merely stated that the motion would be taken under consideration (R. 481) and thereafter denied it on the general ground that "The Commission, under the authority of the Public Utilities Act, pursues a very liberal policy in allowing testimony to go in the record. * * * so I think the motion made by Mr. Appel * * * will * * * be denied" (R. 591). No word was said, no hint given, that the Commission had asked Mr. Cahill to bring these exhibits so that it might have them incon-

[38]Exhibits 8 and 9, R. 163, 164; in evidence, R. 433, 434.

spicuously in the record to use, not as evidence to support a service order, but as evidence of a rate base. Appellant, led to believe that these exhibits, if relevant at all, bore merely upon service matters, had no opportunity to cross-examine, explain, or offer supplementing testimony. Unaware of rate implications, it had no chance to show that these proposed sales were never submitted to or approved by its stockholders, no chance to show that the figures arrived at had been based upon a capitalization of earnings and therefore had no evidentiary weight for rate-making purposes; no chance to show the effect upon the purchase figure of the concurrent cancellation of appellant's obligation to the City and County of San Francisco amounting to nearly $1,700,000,[39] or whether interest rates on deferred payments affected the proposed price; no chance to submit other evidence of the value of its property.

The next witness was Mr. Hall of the Commission's staff (R. 441-456). His testimony, and the exhibits he summarized and identified,[40] related to service: manpower, unused equipment, schedules, load factors, repairs (R. 441-456). Asked by one of the Commissioners whether he would agree to give the Commission the benefit of his recommendations for improvement, he expressed the opinion that closer supervision should be had on the

[39]See supra, p. 27.

[40]Exhibits 11-16. Exhibit 11 (R. 262; in evidence, R. 448) contains tables and charts relating to manpower and service; Exhibits 12-16 (original exhibits in this Court, R. 639-640; in evidence, R. 451, 452, 453) are three photographs of passengers boarding streetcars on Market Street, San Francisco, showing crowded conditions, and a photograph of appellant's equipment in storage.

Market Street system; that if additional manpower could be obtained there would be a general improvement in the maintenance and operation of appellant's equipment (R. 454-455).

The Commission closed its case with a witness whose testimony leaves no doubt as to the scope of the hearing. Mr. Hunter, chief of the Engineering Division of the Commission's Transportation Department, testified that the principal exhibits presented on behalf of the Commission had been made under his supervision; that he had "arrived at certain conclusions and recommendations as a result of the various studies"; that these were embodied in a report he had prepared and which was introduced as Exhibit 17[11] (R. 456). Summarizing the Commission's whole case and stating his conception of the issues to which the hearing had been addressed, he said (R. 456, 457):

> "*I think our exhibits introduced in this record support the conclusion that the service on the Market Street Railway should be improved.* In our study we have attempted to, first, test the service on the ground through other information and then, from that information, attempt to draw conclusions.
>
> . . . . . .
>
> Engineers Mors and Hall have presented here today exhibits which I think support the conclusions and recommendations in this report, therefore, I will proceed to pass to the conclusion as I see it. I will repeat that I think the service on the Market Street Railway should be improved even under war time conditions."

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[11]Exhibit 17, R. 279; in evidence, R. 472.

Mr. Hunter's report is entitled, "Report Dealing With Service on Market Street Railway."[42] Its subject matter is given as:

> "Conclusions and Recommendations Looking Toward a Betterment in the Service Provided by the Market Street Railway Under War Time Conditions, in Connection with the Investigation by the Commission on Its Own Motion In Case 4680. To Be Presented at the Hearing in San Francisco, July 15, 1943."[43]

Its recommendations relate to field supervision, manpower, the institution of a skip-stop program, an operating agreement between appellant and the Municipal system, and the creation of a fund, in which appellant would be required to place its gross revenues less certain limited operating expenses, to be used to pick up deferred maintenance after the war (R. 468-470). The recommendations also included a statement that "The value of the service should be in keeping with the rates."[44] Of this Mr. Hunter said (R. 467):

> "I next refer to the matter of the value of the service. *Although this study and investigation does not analyze the rate situation* I do not think we cannot entirely close our eyes to the value of the service. * * * the passengers are getting less for their money today than they were when they got better transportation. But I think the important thing today is to get transportation of any kind. I think the public is willing to pay if you will give them some service."

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[42]Exhibit 17, R. 279; in evidence, R. 472.
[43]Ibid.
[44]Exhibit 17, R. 279, 286; in evidence, R. 472.

Bearing in mind that the Commission's later rate order is based in part on the claim that the rate should be reduced because the service has become poorer, it will be noted that Mr. Hunter's recommendation was, "The value of the service should be in keeping with the rates" (R. 286), not, "the rates should be in keeping with the value of the service." He was merely emphasizing his view that service improvements should be effected. When he was asked, briefly, whether he meant fares should be reduced when quality of service deteriorates, he explained (R. 492, 493):[45]

> "A. Of course, the service is only one feature in considering a proper rate; you must take into consideration all the elements, that is just one. But, obviously, as the service declines that should be recognized in establishing any rate, but to determine just what a rate should be on a particular service, you could not do it without considering all the other elements that go in. There are many.
>
> Mr. Beck. If the value of service under the 5-cent fare was greater than it is now is it your opinion that the fare now should be below 5 cents?
>
> A. I think, Mr. Beck, in figuring fares you will have to consider all of the elements. I could not answer that question, I would not say that because the service was poorer now than when they had the 5 cents the present fare should be less than 5 cents. There might be many other elements to consider.
>
> Q. In other words, value of service is a very hard thing to evaluate?
>
> A. That is correct."

[45] And see R. 468.

The final hearing was on September 15, 1943. After a patron made a general complaint about service (R. 476-479), and after Mr. Hall, recalled (R. 480), identified and commented on a further exhibit relating to service,[46] appellant opened its case with cross-examination of Mr. Hunter. The questions and testimony related to service (R. 482-509). Mr. Jenkins, a Navy officer, testified that appellant's service to Naval establishments is good (R. 510-518).

Mr. Kahn, appellant's president, took the stand (R. 518). In view of the criticisms of service, he discussed briefly the financial difficulties of the company (R. 519-521). He testified regarding union demands, then before the Labor Board, that would cost the company $1,250,000 a year (R. 522, 555, 563). He showed that since 1937, extension of the Municipal System facilities had diverted a great deal of appellant's traffic.[47] He discussed Mr. Cahill's proposals for leasing appellant's facilities to the City to alleviate traffic conditions (R. 524-526). He discussed a modernization program and the acquisition of busses and trolley coaches (R. 558-561). He discussed the proposals for consolidated operation (R. 561-562). His discussion of rates and revenues was general and purely historical (R. 526-532, 538-540). Its superficial and fragmentary nature rebuts any assumption that it was designed to repel an attack on rates. He responded to a number of questions by the Commission regarding trends of past traffic service and expense (R. 533-537). He told the Com-

[46]Exhibit 18, "Flow of Street Car and Bus Traffic," R. 286A; in evidence, R. 480.

[47]R. 523-524; Exhibit 21, R. 306, in evidence, R. 523.

mission that an increase in traffic would not change his standards of service, but would simply involve additional facilities and proportionate increase in expense without change in the load factor (R. 532-537). He allowed Mr. Cahill to interrupt his testimony and discuss further the proposed leasing arrangements with the City (R. 541-554). He closed his testimony with assurance to the Commission that as soon as conditions permit he intends to continue the company's modernization program, and that his stockholders are thoroughly in accord with his recommendations for improvement in service (R. 560, 564, 565).

Appellant's last and principal witness was Mr. Newton, vice president in charge of operations. All of his testimony related to the company's service.[48]

Notwithstanding this record, the court below held that appellant had adequate notice and opportunity for hearing on the reasonableness of its rates (R. 599-601). It sought to justify this conclusion on the ground that the record contains "voluminous" exhibits and "three volumes of transcribed testimony," and that some of this evidence relates to the present state of appellant's properties, to its financial condition and to its "various rate structures" (R. 600-601). As we have seen, such evidence was all historical. It was relevant to the issue of service and was introduced on that issue. The fact that this same evidence might also be relevant in a rate hearing is beside the point. For example, depreciation practices and operating expenses were here viewed from the

[48]R. 566-590. And see the exhibits prepared by Mr. Newton: Exhibits 26-32, R. 332, 339, 341, 356, 363, 364; in evidence, R. 567, 572, 575, 584.

standpoint of the company's maintenance, replacements, and other service obligations.

The court also attempted to support its holding by saying that at the commencement of the proceedings Commission witness Hunter "gave a resume of the matters for investigation, which included '* * * studies on rate base figures * * *'" (R. 600). Mr. Hunter did not give a resume of the matters for investigation. He enumerated for the Commission the data possessed by its staff and the studies the staff expected to make some time in the future (R. 370). Further, in an effort to justify its ruling, the court said, "The fact that the * * * rate base studies were required to be produced by the Commission as a part of the record was sufficient to give the company ample warning that the commission was seriously proceeding into an investigation of the reasonableness of the existing rate" (R. 600-601). It is difficult to understand this statement. No rate base studies were required to be produced. No rate base studies were produced. As we have shown, Mr. Hunter, the Commission's Chief Engineer who made the introductory statement above quoted, expressly pointed out at the close of the Commission's case that its evidence had been devoted to service matters and that this "investigation does not analyze the rate situation" (R. 467; supra, p. 33).

The hearing required by the due process clause is not one which is artificially spelled out after the order is made from the mere volume of the record, from bits of evidence separated from their context, from occasional passing statements at the trial. It is a hearing which fully and fairly informs the litigant in the course of trial.

It is a hearing at which the administrative tribunal does not formulate one issue and then decide another. Such a hearing was denied appellant. The Commission's order is invalid.

II.

THE ORDER IS INVALID UNDER THE DUE PROCESS CLAUSE BECAUSE IT IS UNSUPPORTED BY EVIDENCE AND IS BASED UPON THE COMMISSION'S SPECULATION AND CONJECTURE.

The hearing having been conducted as above set forth, it is not surprising that the Commission's order is without support in the evidence. This fact, ordinarily somewhat difficult to demonstrate on a large record, is sharply focused in this case because of the openly expressed claim of the Commission that it has the power to act without evidence, and the openly expressed approval of that procedure by the court below (see infra, p. 46).

Earlier in this brief we have described in part the method by which the Commission arrived at its finding that appellant would receive a reasonable rate of return under the 6-cent fare (supra, pp. 15-16). We now quote its findings in this regard. It first purported to find the 7-cent fare unreasonable (R. 87-88):

> "In the eight months' period, January to August, inclusive, of 1943, the operating revenues of the company amounted to $5,689,775, compared with $4,737,856 for the same period in 1942, an increase of twenty per cent. On this basis the total for the full year of 1943 under a seven-cent fare may be expected to be about $8,700,000. If operating expenses in-

creased to $7,940,000, including $750,000 for depreciation and $590,000 for taxes, the net operating revenues would be $760,000, which is a return of 9.6% on $7,950,000, the price at which the company offered to sell its properties to San Francisco in 1942 and again in 1943. If a depreciation allowance is made of $500,000, as set up by the company in previous years, the net operating revenues would be $1,010,000, or a return of 12.7% on said $7,950,000. Both of these rates are excessive and unjustified by the present service."[49]

No one of these total revenue or expense figures appears in the record. No one can be derived from evidence in the record. There is no evidence of appellant's operating revenues for the first eight months of 1943. To obtain the figure of $5,689,775 the Commission consulted reports not in the record (see infra, p. 52). Nor is there evidence of appellant's estimated operating revenues or expenses for the balance of the year. Indeed, the Commission quite frankly gives these figures as its own expectations.

We turn to the more important finding as to appellant's return under the 6-cent fare (R. 90, 91):

"The record clearly indicates that the number of revenue passengers will be substantially greater with a lower fare than with the present seven-cent rate. • • •.

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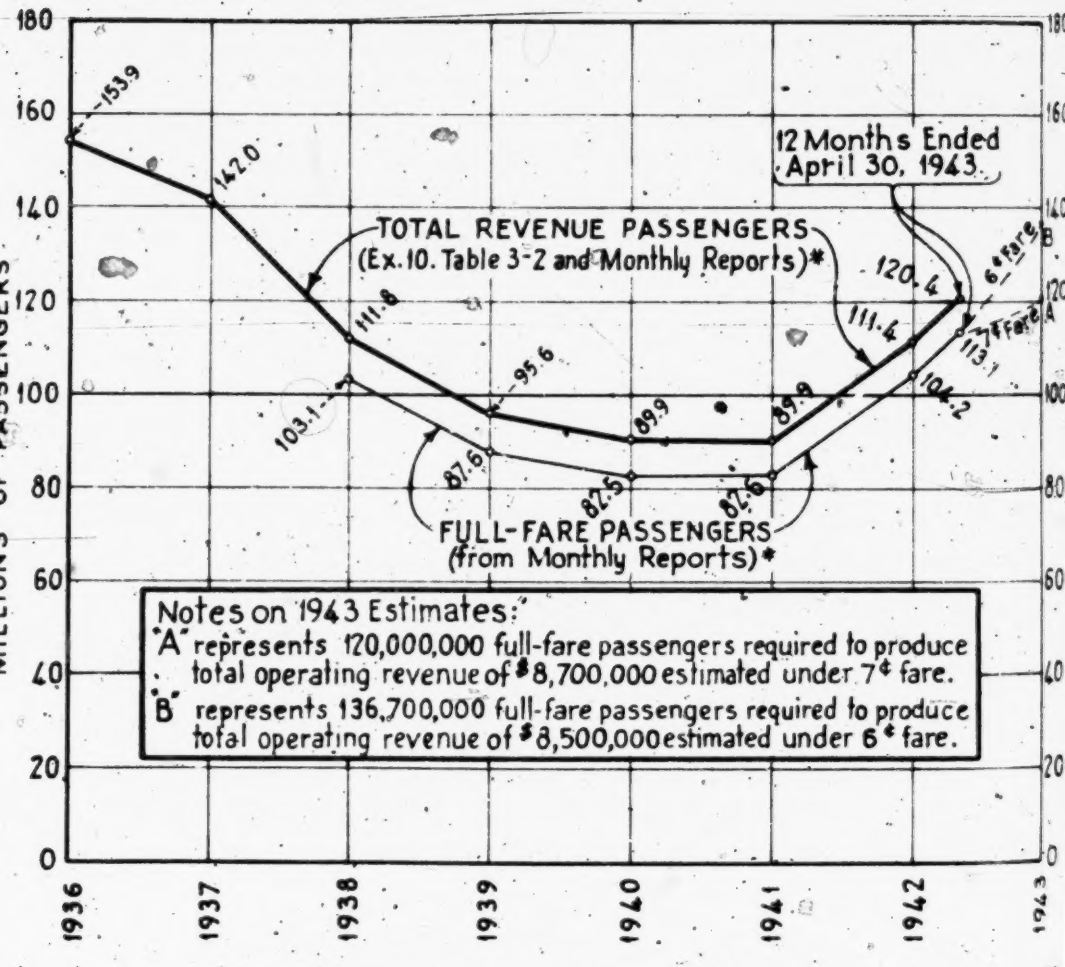
[49]The uncontradicted testimony of the Commission's witness Mors was that a $500,000 depreciation allowance is inadequate; that the amount should be approximately $780,000 (R. 102; Exhibit 10, R. 165, 248-252; in evidence, R. 441). Appellant increased its depreciation expense for 1943 to $750,000 (R. 102). The Commission in its decision allowed $750,000 as the proper charge (R. 91).

> * * * With a six-cent fare it is our expectation, based on the evidence available from the record and from the company's past and present experience, that an annual revenue of approximately $8,500,000 will be produced. Operating expenses, including taxes and $750,000 for depreciation, we estimate, will amount to about $8,000,000, leaving a net operating income of about $500,000, corresponding to an approximate rate of return of 6% on the base figure of $7,950,000. Such a return would be more than adequate under existing conditions."

These figures of revenue and expense appear nowhere in the record and can be derived from no figures in the record. It seems fairly clear from what the Commission says in its decision that they were arrived at upon the basis of some expectation of increase in traffic. But this amount is not stated. It was not until the Commission filed its answer to appellant's pefition to the court below for a writ of review, that appellant was advised that the Commission had "*based its estimate upon an expectation of* [an] * * * *increase of approximately 10 per cent*" (R. 20, 40; italics in original). As we shall show, the Commission later was compelled to revise even this delayed computation and admit that its expectation must have been of an increase in traffic of 13.91 per cent. By way of contrast, it will be observed that its expectation of the increase in operating expense was less than 1 per cent (see infra, p. 44).

In regard to this whole situation, no argument of ours can as clearly demonstrate the lack of due process in the Commission's procedure as the explanation and defense of that procedure presented by the Commission to the court below. In its brief in that court it said:

MARKET STREET RAILWAY COMPANY
TREND OF REVENUE PASSENGERS
1936 TO 1942 AND 1943 ESTIMATED
AT 7-CENT FARE AND 6-CENT FARE



Notes on 1943 Estimates:
"A" represents 120,000,000 full-fare passengers required to produce total operating revenue of $8,700,000 estimated under 7¢ fare.
"B" represents 136,700,000 full-fare passengers required to produce total operating revenue of $8,500,000 estimated under 6¢ fare.

* The company's monthly reports from 1938 to April 1943 are a part of the record by stipulation (Transcript, page 19)

HISTORY OF FARES

1936 5¢ fare, free transfer

1937 { January 1 to July 5: 5¢ fare, free transfer.
July 6 to December 31: 5¢ fare, 2¢ transfer.

1938 { January 1 to May 28: 5¢ fare, 2¢ transfer.
May 29 to December 31: 7¢ or 4 tokens for 25¢, free transfer.

"With respect to the basis of the Commission's revenue estimates, the Court is respectfully referred to the diagram opposite this page,[19a] on which the total revenue passengers of petitioner are plotted from 1936 to 1942, inclusive, showing both the trend of traffic and the actual figures for each of those years. * * * The diagram also shows in dotted lines the estimated full-fare passengers for the entire year 1943 with, respectively, the 7-cent fare and the 6-cent fare in effect. *These dotted lines represent the estimates made by the Commission.*

The Commission concluded that with the 7-cent fare in effect for the full year 1943 approximately 120,000,000 full-fare passengers would make use of petitioner's lines. This number of passengers would produce (120,000,000 x 7 cents) $8,400,000 gross revenue. * * * The additional $300,000 would be contributed, in the same proportions as in the past, by revenues other than from the 7-cent fare. * * *

In reaching this conclusion the Commission obviously made a conservative and reasonable estimate. The upward trend of full-fare passengers is clearly shown when the years 1941 and 1942 are compared and that upward trend is even sharper for the 12-month period ended April 30, 1943. Based on this evidence in the record, *the Commission could properly and reasonably assume that this trend would hold throughout the year 1943 and for a reasonable period in the immediate future.* The Commission, however, took a more conservative attitude and concluded that the number of full-fare passengers for

[19a]The diagram referred to is the one copied on the opposite page of this brief.

the year 1943 would amount to only 120,000,000. *This estimate of full-fare passengers is the Commission's own estimate and cannot therefore appear in the record, and neither is reference made to that particular figure in the decision.* • • •

• • • The Commission's allowance of $7,940,000 for operating expenses in 1943 was estimated in a manner similar to its estimate of traffic and of revenue as above referred to.

The Commission's conclusion as to the number of full-fare passengers that would make use of petitioner's service under a 6-cent fare is shown at point B of the preceding diagram and represents 136,700,000 passengers. This number, at a 6-cent fare, will produce an operating revenue of approximately $8,200,000. The Commission's conclusion was that with a 6-cent fare the total annual operating revenue of petitioner would amount to $8,500,000, a difference of $300,000, which is again accounted for by revenues from other than 6-cent fares. The difference between the estimated number of passengers under the 6-cent fare and the number estimated under the 7-cent fare, it will be noted, is due to the stimulation of traffic resulting from the decrease in fare, and is comparable to the loss of passengers in 1937, 1938 and 1939 when the fares were progressively increased from 5 cents to 7 cents.

• • • • • • •

With reference to petitioner's allegation that 'evidence is entirely absent' concerning an estimate of expense of handling the traffic under a 6-cent fare, the record contains the exact expense figures for all the years 1922 to 1942, inclusive, and also for the 12-month period ended April 30, 1943. • • • The Com-

mission made an allowance for operating expenses of $8,000,000 for handling the traffic that might be expected under the 6-cent fare, an increase in operating expenses of $1,500,000 in round numbers, over and above the actual figure for 1942.

The Commission made no finespun estimates. They were not necessary. It concerned itself solely with two questions: first, how much traffic (how many car riders and bus riders) would there be; second, what would it cost to haul such traffic? *If the number of riders is known or estimated,* the record provides an almost exact basis for determining the revenue that will be produced by such riders (more than 95 per cent of petitioner's revenue has been produced by full-fare passengers). The number of riders in all of the years of the recent past is definitely known and shown in the record under the 5-cent fare, under the increases granted by the Commission in 1937 and 1938, and under the straight 7-cent fare since 1939. *The Commission encountered no difficulty in reaching a reasonable conclusion of what might be expected in the way of traffic and revenue, in round numbers, during an immediate future 12-month period.* The cost of handling the existing traffic in the immediate and more distant past is fully shown in the voluminous record. *The Commission made a substantial and liberal allowance for increased expenses."*

It will thus be seen that the Commission claims to have derived its unsupported expectation of appellant's revenues under the 6-cent fare from its unsupported expectation that appellant would enjoy an increase of 13.91 per cent in full-fare San Francisco passengers (excluding all passengers on the suburban cars and all passengers travel-

ing on school and excursion passes), an increase of 16,700,000 full-fare San Francisco passengers a year! Paraphrasing this Court's opinion in *West Ohio Gas Co. v. Comm'n (No. 1)* 294 U.S. 63, 68, the Commission might with as much reason have assumed an increase of 5 per cent, or of 8 per cent, or of 15 per cent, or of any other figure. "This was wholly arbitrary" (294 U.S., 68).

But even more startling is its expectation with respect to operating expenses, an expectation without any support whatever, except the Commission's conception of what is "a substantial and liberal allowance." With this greatly increased load, the Commission's expectation was that operating expenses would increase less than 1 per cent. In other words, the Commission proceeded upon the assumption that it costs appellant $7,940,000 (R. 87) to haul 120,000,000 passengers a year, that is, at the rate of 6.616 cents per passenger (an amount, it will be noted, in excess of the 6-cent fare ordered), but that it could haul 16,700,000 additional passengers at a total cost of $60,000, or .359 cents per passenger, a difference of 1742 per cent. If an expert witness were so to testify, his testimony would be incredible on its face. But there is no such testimony. The only testimony bearing on the point is that, in the normal course of transportation service, as traffic increases, car hours increase,[50] with an attendant increase in expense.

Furthermore, all the Commission's expectations were arrived at without giving any consideration to past or future allocation of traffic, revenue and expense between

[50] R. 536-537.

the service rendered to the San Francisco patrons whose fare was reduced, and that rendered to suburban patrons on the San Mateo line. There is no evidence in the record, there is not even an expressed expectation, allocating plant and expense between the San Francisco and suburban lines. There is thus no basis in the record, not even in an expressed expectation, for any test of the reasonableness of the ordered rates.

The Commission's expectations of future revenue, future expense and future traffic form the very foundation upon which the order rests. As the record shows, and as is demonstrated by the Commission's own statement above, they were made without evidence. The figures for traffic, revenue and expense under the existing 7-cent fare up to the effective date of the Commission's order were unsupported expectations; the figures for the ordered 6-cent fare were expectations upon expectations. In its petition for rehearing before the Commission and in argument in support of that petition appellant pointed out the many factors which enter into arriving at reasonable estimates of passenger traffic; the many factors which differentiate the present war years from the years 1937 and 1938 when the former change in fares occurred; the many factors which differentiate the situation then existing, when the fare increase ended the uniform 5-cent fare on both lines, and the situation which may be expected under a rate structure which still retains a differential of one cent between the two lines; the many factors which enter into arriving at estimates of expense, particularly under such assumed radical changes of condition as an increase in traffic of nearly 17,000,000 passengers, when equipment

and manpower are already strained to the utmost because of war conditions.[50a] And appellant urged that such matters are properly the subject of expert testimony, subject to cross-examination, explanation and rebuttal, from which testimony the Commission, using its expert judgment, can arrive at reasonable and supported estimates. But the Commission considered that its function goes beyond the use of expert *judgment;* it asserted the right to use its expert *knowledge* in supplying missing facts.

And the Supreme Court of California expressly approved the Commission's procedure, holding that the Commission was not required to act upon evidence, but could resort to its own "experience" and "data at hand" to supply facts essential to the validity of its order (R. 620):

> "The commission has the experience and the data at hand from which to cull the estimates of probable increase in traffic under a reduced fare and improved service, and of the probable future operating revenues, expenses, and other costs."

This ruling is contrary to the most fundamental concepts of procedural due process of law.[51]

[50a] Compare the statement in the concurring opinion of Commissioners Baker and Craemer (R. 103-104):

> "Such increase in the volume of traffic, of course, will necessitate an increase in the frequency of service, which, in turn, will require both additional equipment and additional manpower, with attendant increase in the cost of operations."

[51] "* * * we are concerned only with the question of procedural due process, that is, whether the Commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution * * *. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the

As this Court said in *Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 300-302:

"The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

* * * * * * *

An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited * * * as giving support to the new doctrine that the values of land and labor and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our

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Commission must act upon evidence and not arbitrarily" (*Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 392, 393).

"There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such * * *. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order * * *.

The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action" (*Morgan v. United States*, 298 U.S. 468, 480).

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. * * * Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so

opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. * * * They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. * * * *How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves.* For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states * * * but not of the extent of the depreciation at a given time and place. * * * The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. * * *

What was done by the Commission is subject, however, to an objection even deeper. * * * There has

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freely, that the 'inexorable safeguard' * * * of a fair and open hearing be maintained in its integrity. * * * The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored" (*Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 304-305).

"A finding without evidence is arbitrary and baseless. And if the * * * contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government * * *. Such authority, however beneficially exercised in one case, could be injuriously exercised in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power" (*Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88, 91).

"The basic elements of such a hearing include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence" (*Carter v. Kubler*, 320 U.S. 243, 247).

been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion."

The Commission cited *Clark's Ferry Co. v. Comm'n*, 291 U.S. 227, as authority for the proposition that, without evidence, it could "forecast into the future what the traffic was going to be * * *" (R. 128). This is another example of an opinion of this Court "much misread." In the *Clark's Ferry* case, this Court approved a tentative schedule of rates based upon evidence taken at a full and fair hearing. The reports of that case expressly disclose that expert testimony concerning estimated revenues under the order was taken in the proceeding before the Commission.[52] So, also, in *Driscoll v. Edison Co.*, 307 U.S. 104, quoted by the court below (R. 621), essential estimates were supported by the testimony of experts (see 307 U.S., pp. 118, 119-120).

While the deeper vice of the Commission's ruling is in its procedure, rather than in its result, the fact also is apparent that its expectations are incorrect. We already have pointed out the unsupported and incredible character of its underlying assumptions as to increased traffic and expense (supra, p. 44). Other errors are apparent. In the first place, the Commission's expectation that the upward trend of traffic under the 7-cent fare would continue

[52]See the opinion of the Superior Court of Pennsylvania, 108 Pa.Super.Ct. 49, 165 Atl. 261, 272.

is contrary to experience and to facts of common knowledge. For example, at page 148 of this record appears a chart showing in graph form the number of fare passengers carried by appellant and the Municipal Railway of San Francisco. In 1934 the line of the graph dips rapidly during the general strike and later returns to normal. In 1938 it again dips rapidly with the institution of the 7-cent fare and then levels out. Each of these downward trends and each return or leveling out, is susceptible of explanation. It would have been quite unreasonable in 1938, just before the line reached the bottom of its drop, to speculate that the downward trend would continue without change. Expert testimony would have shown this.

The nature of at least some of the factors the Commission took into consideration in making its speculations is shown in the Commission's decision (R. 89):

> "An increased use by the public of all mass transportation facilities must definitely be expected in San Francisco, not only because of further reduction in the gasoline allowance and the declining number of automobiles, but also in view of the certain increase of direct and indirect war activities in this area."

Granting that the Commission might judicially notice general war conditions, the *extent* of the increase in population, of the decline in the number of cars, of the future supply of gasoline and of the probable increase, if any, in the use of transportation facilities, are still facts to be established by the testimony of experts, subject to cross-examination and rebuttal (*Ohio Bell Tel. Co. v. Comm'n*, 301 U.S. 292, 300-302, quoted supra, pp. 47-49). And, as this

Court emphasized in the case just cited, "The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue" (301 U.S., 301).

Moreover, the Commission's speculation as to the "certain" increase of war activities turned out to be wrong.[53]

The Commission's assumption of a still greater increased traffic under the 6-cent fare is contrary to the record. In these war times appellant cannot get new facilities and those it has are burdened to capacity. Commissioner Sachse in questioning Mr. Kahn asked about "the normal period before the war traffic over-burdened all your transportation facilities, regardless of fare" (R. 539). And much evidence in the record is devoted to discussing—indeed criticizing—the overloaded condition of appellant's cars.[54] Further, the undisputed testimony is

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[53]California Labor Statistics Bulletins, issued by the Department of Industrial Relations of the State of California show that the number of wage earners in manufacturing industries in the San Francisco Bay Area declined from 274,300 in December, 1943 (immediately following the Commission's decision) to 258,000 in September, 1944 (the month in which appellant's operations ceased).

Bulletin No.	Month	Wage Earners
234	December, 1943	274,300
	January, 1944	268,400
236	February, 1944	266,900
	March, 1944	259,600
238	April, 1944	255,400
	May, 1944	252,600
240	June, 1944	248,400
	July, 1944	252,000
242	August, 1944	258,700
	September, 1944	258,000

[54]Exhibit No. 6, R. 161; in evidence, R. 387; R. 386-388; Exhibit No. 11, R. 262, 272, 273, 277; in evidence, R. 448; R. 445-447.

that under present conditions the 7-cent fare does not discourage riders.[55]

All of the foregoing brings us back to our first point. A rate order has followed a case that was not tried as a rate case and in which the evidence to support a rate order was not produced. The fundamental soundness of the guaranty of notice and opportunity for hearing is illustrated in the result of this proceeding.

III.

THE ORDER IS INVALID UNDER THE DUE PROCESS CLAUSE BECAUSE IT IS BASED ON MATTERS OUTSIDE THE RECORD, SPECIFICALLY UPON DATA TAKEN FROM MONTHLY REPORTS OF APPELLANT WHICH FORM NO PART OF THE RECORD.

In its decision the Commission stated that "In the eight months' period, January to August, inclusive, of 1943, the operating revenues of the company amounted to $5,689,775 * * *" (R. 87). There is no evidence in the record which shows appellant's operating revenues after May, 1943. In its brief in the court below the Commission stated its position:

> "Respondent frankly admits that the figure of $5,689,775 was taken from petitioner's monthly reports filed with respondent pursuant to the Commission's General Order No. 65. * * * While respondent does not concede that the reference to these monthly re-

[55]Mr. Cahill, quoted supra, p. 29.
Mr. Hunter (R. 467): "* * * the important thing today is to get transportation of any kind. I think the public is willing to pay if you will give them some service."

ports of the petitioner to and including August of 1943 constituted error, nevertheless, should it be held otherwise, it is very obvious that such irregularity or error was harmless and immaterial and that such a situation comes squarely within the rule laid down by the United States Supreme Court in the case of *Railroad Commission v. Pacific Gas and Electric Company*, 302 U.S. 388, 394, 395. If, as has been conclusively shown above, the record supports the reasonableness of the 6-cent fare, it is perfectly immaterial whether or not the Commission may have used some additional figures or may have proceeded upon some erroneous theory so long as the result was correct."

Appellees misread the decision of this Court in the case cited. The question involved here is not substantive due process—whether the rate order is confiscatory—but procedural due process. Under the latter, an administrative order may not be upheld on "facts conceivably known to" the administrative officer "but not put in evidence" (*Chicago Junction Case*, 264 U.S. 258, 263; *Crowell v. Benson*, 285 U.S. 22, 48; *Ohio Bell Tel. Co. v. Comm'n*, 301 U. S. 292, 300; *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 286). Administrative officers "cannot act upon their own information * * *. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal" (*Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88, 93). A fair hearing includes "the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence" (*Carter v. Kubler*, 320 U.S. 243, 247).

In the *Pacific Gas and Electric* case, cited by the Commission, the inquiry was whether the Commission erred in refusing to "consider the fair value of respondent's property," and in fixing the rate base solely upon "the historical cost" (*R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388, 395). Of this contention this Court said (ibid., pp. 393-394):

> "The complaint is not of the absence of these rudiments of fair play but of the method by which the Commission arrived at its result. As to this a fundamental distinction must be observed. While a fair and open hearing must be accorded as an inexorable safeguard, we do not sit as an appellate board of revision but to enforce constitutional rights. *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 446. When the rate-making agency of the state gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, *and makes its determination upon evidence* and not arbitrarily, the requirements of procedural due process are met, and the question that remains for this Court, or a lower federal court, is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the rates it fixes will result in confiscation."

In its opinion the Court cited *West Ohio Gas Co. v. Comm'n (No. 1)* 294 U.S. 63, 70, where, after the case had been tried and submitted the Commission made an *ex parte* order, without the utility's knowledge, directing that the utility's annual reports be made a part of the record and, on the basis of these reports, made certain findings.

Speaking of the substantive aspects of the order this Court said (294 U.S., p. 70):

> "Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern Ry. Co. v. Virginia*, 290 U.S. 190) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error."

But the Court held the order invalid for want of procedural due process (ibid.):

> "But the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities, nor did opportunity exist to bring the rates outside of Lima into harmony with the exigencies of a new method of allocation adopted without warning."

If a commission had the power, here claimed, to consider reports forming no part of the record—as the court below held, to base its findings and order on its "experience" and "data at hand"—there would be no occasion for rate hearings. A commission on the basis of reports which utilities are required to file, and on the basis of its own expert knowledge, could as well enter an *ex parte* rate reduction order. The California Commission would assure the utility that it is not without a remedy: it need only show that the order is confiscatory

and the court will set it aside. But on what record? The only "facts" are in the Commission's mind and files.

There is another way to try rate cases—the way in which they have been tried for many years, before appellee and before similar tribunals and in the courts. The facts upon which the Commission acts are introduced in evidence. A properly qualified expert can analyze conditions and express his opinion of future developments. The other side can cross-examine and check the basis of his computations and the assumptions on which he has proceeded. The tribunal before which the witness appears then has evidence upon which it can exercise its judgment and a record upon which a reviewing court can act.[56]

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[56]Section 67 of the Public Utilities Act of California (Deering's California General Laws, Act 6386) provides that court review must be on the record made before the Commission:

> "* * * the applicant may apply to the Supreme Court of this State for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ * * * shall direct the commission to certify its record in the case to the court. * * * No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it."

IV.

IN SO FAR AS THE ORDER IS BASED ON THE SO-CALLED "VALUE OF SERVICE" THEORY IT IS INVALID UNDER THE DUE PROCESS CLAUSE BECAUSE (A) THERE IS NO EVIDENCE JUSTIFYING A RATE REDUCTION ON THIS BASIS, AND (B) A CONFISCATORY RATE CANNOT BE SUSTAINED ON THE THEORY THAT IT IS AN ADEQUATE PRICE FOR THE SERVICE INDEPENDENTLY VALUED.

(a) There is no evidence justifying a rate reduction on the basis of the value of appellant's service.

The only witness who was asked about the value of appellant's service was the Commission's chief witness, Mr. Hunter (R. 492-493) whose testimony on this point has been quoted (supra, p. 34). He testified that "service is only one feature in considering a proper rate; you must take into consideration all the elements, that is just one" (R. 42); that "value of service is a very hard thing to evaluate" (R. 493).

The vital portion of appellant's service, that to war industries, was admittedly adequate (R. 75). Nevertheless, the order reduces the rate for this service, as well as others, thereby, of course, tending to deprive appellant of revenue that enables it to render the service. Further, the order reduces only the San Francisco full-fare rate. The character of appellant's service to San Francisco full-fare patrons cannot differ substantially from that rendered to patrons on the San Mateo line and to patrons who use school passes and Sunday passes on the same cars and at the same times as full-fare patrons. There is no evidence of any distinction. Nevertheless, the order reduces only the one rate. The point is, not that appellant complains of an order less drastic than might

have been made, but that the order is clearly without any rational foundation or basis in the evidence.

The Commission does not point to any evidence, and there is none, indicating in dollars and cents the value of appellant's service, but refers instead to general operative and management matters (R. 64-73). It seeks to sustain its decision, in the absence of evidence of the value of appellant's service, by claiming the right to use its own judgment, ascribing various dollar-and-cent values to the various elements it enumerates and thus reaching a result (R. 81-82, 90, 124-125). Yet the Commission's chief engineer and principal witness, and the only witness who testified about the value of appellant's service, conceded the impossibility of putting a value upon service as such (supra, p. 34).

In its opinion on rehearing the Commission said (R. 121-122):

> "The decision is specific that the character and quality of the service rendered by the company does not justify a rate higher than six cents * * *."

The Commission, however, does not point to evidence by which it reached this 6-cent figure for the value of the service. There is none. If it were open to the Commission to choose some figure without support in the evidence, the figure might just as well have been 5 cents or 15 cents. Its purported finding on value of service falls under the condemnation of all administrative findings that lack evidentiary foundation. *Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88, 91, and other cases cited supra, page 46, n. 51.

(b) A confiscatory rate cannot be sustained on the theory that it is an adequate price for the service independently valued.

In support of its theory that a commission may fix a rate based on its conception of "value of service," the Commission cited *Covington &c. Turnpike Co. v. Sandford*, 164 U.S. 578, 596,[57] and *Smyth v. Ames*, 169 U.S. 466, 546 (R. 77). Those decisions sanctioned the rates on the basis of the value of the company's property. The court used "value of the service" as the equivalent of expenses plus a fair return on the value of property, rather than as some independent valuation to be placed upon service as such. Neither case suggests that "value of service" justifies confiscation. *Spring Val. Waterworks v. City, etc., of San Francisco* (1911) 192 Fed. 137, cited by the court below (R. 622) is also not in point. There the District Judge merely mentioned the *Covington* case (p. 145) for the proposition that "the public cannot be subjected to unreasonable rates, in order simply that stockholders may earn dividends." "Value of service" had nothing to do with the judgment, which set aside as confiscatory the rate ordinance under attack.

The third authority mentioned by the court below on the value of service theory (R. 622), "Value of service as a Factor in Rate Making," 32 Harvard Law Review 516, holds the opposite of the proposition for which it is cited. The article, by Mr. Edgerton, now Justice of the Court of Appeals for the District of Columbia, concludes (ibid., p. 556):

> "In summary: It is frequently said, by eminent courts, commissions, and text-writers, that the value

[57] The Supreme Court of California also cited the *Covington* case to the same point (R. 622).

> of a service is entitled to quite as much weight as the cost of the service in the fixing of public-service rates. The decisions do not bear out, but contradict, such statements. The decisions establish that the value of the service—which means substantially public policy—is not a criterion either superior to or coordinate with the cost of the service. This is entirely sound and largely inevitable."

Earlier decisions of the Commission, upon which it now relies, do not support its present action. In the latest of them, *Coast Valleys G. & E. Company*, 24 C.R.C. 53 (R. 79), the Commission determined a rate based upon valuation figures, etc., and then, considering that the service was bad, allowed a higher return in order that the service might be improved. The *Rogers* (R. 77) and *Lake Hemet* (R. 78) cases do nothing more than cite the *Covington* and *Smyth v. Ames* principles by way of dicta. The ultimate holding in each case was that the respective rates were not confiscatory (cf. 32 Harv. L. Rev. 516, 528).

Decisions which consider the so-called "value of service" theory uniformly hold that it must be rejected as the basis for determining reasonable rates and cannot be invoked to justify a confiscatory rate. As Justice Edgerton's article points out (32 Harv. L. Rev. 516, 530, 550) the value of service theory is discredited in *Nor. Pac. Ry. v. North Dakota*, 236 U.S. 585, where this Court, after touching on value of service (p. 599) said (p. 604):

> "The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and

a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

Lower courts have spoken even more directly to the point. In *Chicago Rys. Co. v. Illinois Commerce Commission* (3 judge court, N. D. Ill. 1922) 277 Fed. 970, involving street car fares reduced by the commission, the court said (pp. 976-977):

"The order of the commission found that at no time since the entry of the 8-cent fare order—'have the companies rendered, nor are they now rendering, safe, adequate, or efficient service; that, on the contrary, the service rendered by them has during all said time been, and now is, grossly inadequate and inefficient; * * * and that said companies have not * * * shown any just or reasonable reason * * * for not furnishing adequate and efficient service.'

The order then states that the service rendered by the plaintiff companies since November 5, 1920 (the date the 8-cent fare was established), and now being rendered by them, is reasonably worth no more than a 5-cent fare for adults and a 3-cent fare for children.

These findings are entirely beside the question. They might have been very important on a bill by the Attorney General to forfeit the charter of the companies. *They have nothing whatever to do with the operating cost, but are based upon the opinion of the commission that the services actually rendered, no matter at what cost, are worth in reality only 5 cents.* The commission should have ordered whatever changes

in their opinion were proper, and adjusted the rate after the various reforms had been carried out.

At this point it may be well to state that the record shows that the actual operating expenses of the Chicago Surface Lines, comprising wages, taxes, and power, amount to more than 6 cents for every passenger carried. *It may be that the Surface Lines, the plaintiffs here, could improve their business methods; but the Illinois Commerce Commission is not permitted, under the law, to force that improvement by penalizing them with a rate which will not return even the operating expenses, and might, in fact, prevent them from rendering any service at all.*"

To the same effect, are:

Mississippi River Fuel Corp. v. Federal Power Com'n (8th C.C.A. 1941) 121 F. (2d) 159, 164-165;

Telluride Power Co. v. Public Utilities Commission (3 Judge court, D. Utah 1934) 8 F. Supp. 341, 343-344;

Georgia Power & Light Co. v. Georgia Public Serv. Com'n (3 Judge court, N.D. Ga. 1934) 8 F. Supp. 603, 604-605;

Denver Union Stock Yard Co. v. United States (3 Judge court, D. Colo. 1932) 57 F. (2d) 735, 740-741;

State v. Department of Public Works of Washington (1934) 179 Wash. 461, 38 P. (2d) 350, 353;

Wisconsin-Minnesota Light & P. Co. v. Railroad Commission (1924) 183 Wis. 96, 197 N.W. 359, 362;

Duluth St. Ry. Co. v. Railroad Commission (1915) 161 Wis. 245, 152 N.W. 887, 892-893.

Regulatory bodies have ample power to make appropriate orders dealing with service. The statute giving the California Commission these powers has been referred to and is quoted in the appendix to this brief (Appendix, p. 31 et seq.). A reasonable order exercising such powers must be obeyed. But a utility, compelled by law to render service, cannot be required to do so at confiscatory rates. As the court said in *Georgia Power & Light Co. v. Georgia Public Serv. Com'n* (N.D. Ga., 1934) 8 F. Supp. 603, 605:

> "If complainant's service is costing more than its worth, we see no remedy but for consumers to find a substitute. It cannot constitutionally be compelled by the state without just compensation."

The soundness of this principle is apparent in the case at bar. As the people of San Francisco have desired a service different from appellant's, they have, since 1912, expanded their municipal lines. The competition of these lines has been the greatest source of appellant's financial difficulties. If the people of San Francisco want service other than appellant's, they have the means available. So long, however, as appellant is compelled to serve them, it cannot be compelled to do so at a loss.[58]

[58]As pointed out above (supra, p. 4), the people of San Francisco have now purchased all of appellant's operative properties and are providing their own service at a 7-cent fare.

V.

THE ORDER IS INVALID UNDER THE DUE PROCESS CLAUSE BECAUSE IT IS CONFISCATORY. IT WILL REDUCE APPELLANT'S REVENUE TO A POINT WHERE APPELLANT WILL BE COMPELLED TO OPERATE AT A LOSS.

Under any test, the order in this case is confiscatory, for it will compel appellant to operate at a loss. It is immaterial, therefore, whether the Commission correctly adopted a figure of $7,950,000 as the fair value of appellant's property. However, we submit that in so holding the Commission clearly erred. Market or commercial value is not, and cannot be, a test.[59] What a thing will sell for is determined by its earning power, which, in turn, is determined by its rates.[60] As this Court said in *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 601:

> "The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the

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[59] "For the purpose of public regulation market value can have absolutely no application. • • • What the thing will sell for, of course, is largely determined in the market by its earning power. The earning power of a utility is determined by its rates."

John M. Eschleman (draftsman of the California Public Utilities Act and first President of the California Railroad Commission), "Control of Public Utilities," 2 Cal. L. Rev. 104, 112.

> "Commercial or condemnation value depends directly or indirectly upon earning power; but since this depends, in turn, upon the prices charged for the product, such value cannot be used as the basis of rate-making."

John Bauer, Director, The American Public Utilities Bureau, "The Establishment and Administration of a 'Prudent Investment' Rate Base," 53 Yale L. J. 495, 498.

[60] In fact, as appellant asked leave to show in the proceedings on rehearing before the Commission (see. R. 132, 608, 619-620), the figure of $7,950,000 was based upon a capitalization of earnings in a study made in connection with the proposed acquisition by the City of appellant's lines.

going enterprise depends on earnings under whatever rates may be anticipated."

Beyond this, the Commission treated the $7,950,000 as an amount at which appellant had "offered" (R. 88) its property to the City. In fact, there was no offer. The exhibits[61] show there were abortive negotiations, tentative on each side. Appellant's president and board of directors, the Mayor, other city officials, including the Board of Supervisors, agreed, so far as they could. Their tentative agreement, however, was subject on the City's part to a vote of the people,[62] and on appellant's part to the vote of its shareholders.[63] The voters did not give the necessary vote.[64] The shareholders were never consulted. The events proved nothing. Other factors impeaching these resolutions as evidence of fair value have been stated above (supra, p. 31).

The only evidence in the record that has any probative force in showing the fair value of appellant's property is given in the historical data appearing in one of the Commission's exhibits.[65] This exhibit shows that the book value of appellant's properties is $41,768,505.20, that the Commission's own historical reproduction cost, adjusted to December 31, 1942, is $25,343,543, and that appellant's capitalization is $37,921,323.96 (see supra, p. 11). On the Commission's own figure of expected income, the rate of

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[61]Exhibits 8, 9, R. 163, 164; in evidence, R. 433, 434.
[62]Ibid.
[63]California Civil Code, §§ 343, 494, 510.
[64]Exhibit 10, R. 165, 176; in evidence, R. 441.
[65]Exhibit 10, R. 165; in evidence, R. 441.

return on these bases would be, respectively, 1.19 per cent, 1.97 per cent, and 1.31 per cent.

If the tests of the *Hope* case[66] be applied, the order ist still confiscatory. The record leaves no doubt[67] that the return enjoyed by appellant is not "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital"; to "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed" (*Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 605).

But again we emphasize that discussion of rate base in this case is unimportant. The order will compel appellant to operate at a loss. The Commission's figures for operation under the 6-cent fare were: gross operating revenue affected by the order $8,200,000, other operating revenue $300,000, or total gross operating revenue $8,500,000; operating expenses $8,000,000 (R. 91; supra, pp. 42-43). These figures were based upon an expected increase of 16,700,000 passengers per year over the number carried at the 7-cent fare (supra, pp. 41-42). Multiplied by 6 cents, this gives $1,002,000 attributable to the increased traffic expected by the Commission. Deducting this figure, which is without support in and is contrary to the evidence, the total gross operating revenue becomes $7,498,000, or $502,000 less than the $8,000,000 operating expenses estimated by the Commission under the 6-cent fare.

An operating loss is still shown even if the operating expenses allowed for the 7-cent fare (without stimulation

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[66] *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591.
[67] See the facts stated at pp. 12-13, supra.

of traffic) be taken. The Commission estimated operating expenses under the 7-cent fare at $7,940,000 (R. 87). Allowing for no increase in operating expense as a corollary to disallowing the assumed increase in traffic, the figures remain: total gross operating revenue, $8,500,000, less $1,002,000 attributable to the unsupported traffic increase, leaves $7,498,000; applying this against the $7,940,000 operating expenses produces an operating loss of $442,000.

Looking at the matter another way and assuming that there may, in fact, be increased traffic at 6 cents amounting to $1,002,000, a proportionate increase in expenses would be (13.91 per cent of $7,940,000) $1,104,454, instead of the $60,000 allowed by the Commission. Total operating expenses would then be $9,044,454—changing the Commission's estimated profit of $500,000 into an operating deficit of $544,454.

Finally, even if it be assumed that depreciation and taxes remain constant, and the increased expense be computed on $6,600,000 ($7,940,000, less $750,000 depreciation and $590,000 taxes allowed by the Commission (R. 87)), the figures are: 13.91% of $6,600,000 is $918,060, which added to $7,940,000 gives $8,858,060 as expenses under the 6-cent fare. Applied against the $8,500,000 anticipated total operating revenue, this changes the Commission's anticipated net operating revenue of $500,000 into an operating deficit of $358,060.

We respectfully submit that the judgment of the Supreme Court of California, affirming the order of the Railroad Commission, is erroneous and should be reversed.

Dated, San Francisco, California,
January 29, 1945.

Respectfully submitted,
CYRIL APPEL,
FELIX T. SMITH,
FRANCIS R. KIRKHAM,
HENRY G. HAYES,
Counsel for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Appendix Follows.)

Appendix

EXHIBIT A

(Endorsed): Filed Mar. 8, 1944,
A. V. Haskell, Clerk,
By H.,
S. F. Deputy.

In the Supreme Court of the State of California
IN BANK

S. F. No. 16,988

Market Street Railway Company,
Petitioner,

vs.

Railroad Commission of the State of California and Franck R. Havenner, C. C. Baker, Justus F. Craemer, Richard Sachse and Frank W. Clark, the members of and constituting The Railroad Commission of the State of California,
Respondents.

ORDER STAYING AND SUSPENDING DECISION AND ORDER OF RAILROAD COMMISSION PENDING REVIEW.

By the Court:

WHEREAS, petitioner, on January 20, 1944, filed its verified petition praying that this court issue a writ of review

to the Railroad Commission of the State of California to review the decision and order of said Commission made on November 30, 1943, being Decision No. 36,739, in that certain proceeding pending before said Commission, entitled

> "In the Matter of the Investigation upon the Commission's own motion into the reasonableness of the rates and charges, and into the sufficiency and adequacy of the operations, service and facilities, of the Market Street Railway Company, Case No. 4680";

and

WHEREAS, in said petition, petitioner prayed that this court make its order staying and suspending the operation of said decision and order during the pendency of said writ of review; and

WHEREAS, this court, on February 28, 1944, made an order directing that a writ of review issue, returnable on March 21, 1944, and said writ was issued on March 6, 1944; and

WHEREAS, this court, on February 28, 1944, issued its order granting a temporary stay of said decision and order of the Railroad Commission, and also issued its order directing respondents to show cause, on March 7, 1944, why said decision and order should not be stayed and suspended during the pendency of the review proceeding; and

WHEREAS, this court finds from the verified petition for a writ of review that in the event said decision and order be finally annulled great and irreparable damage will re-

sult to petitioner if said decision and order are not stayed during the pendency of the review proceeding, in that petitioner would be unable to collect the difference between its present fare of seven cents per passenger and the fare of six cents per passenger required to be charged by said decision and order, a difference amounting to a loss of revenue of some $3,000 a day, which difference petitioner could not recover from patrons paying said reduced fare;

NOW, THEREFORE, IT IS ORDERED that said decision and order of the Railroad Commission, being Decision No. 36,739 in Case No. 4680, issued on November 30, 1943, be and the same hereby are stayed and suspended during the pendency of this review proceeding.

This order staying and suspending said decision and order of the Railroad Commission shall become effective on the execution and filing by petitioner with this court; and the approval by this court, of a bond payable to the People of the State of California in the sum of One Hundred Thousand Dollars ($100,000) effective as of February 29, 1944. In view of the further conditions imposed upon petitioner by this order, such bond is deemed sufficient in amount and security to enforce the prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys which any person may be compelled to pay petitioner for transportation, pending review, in excess of the charges fixed by said decision and order of the Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed.

It is ordered that upon the approval by this court of said $100,000 bond, effective as of February 29, 1944, the $50,000 suspending bond on temporary stay, filed herein on February 28, 1944, be and it is hereby exonerated.

Petitioner shall deposit with this court on the first day of each month during the pendency of this review proceeding, beginning on April 1, 1944, a Certificate of Indebtedness 7/8% issued by the United States Government, of the face amount of $100,000, payable to bearer, to be held by this court as further security to enforce the prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed. In the event said decision and order are annulled by order of this court upon review, such Certificates of Indebtedness so deposited with this court shall be returned to petitioner.

Petitioner shall keep monthly reports and accounts, verified by oath and in form satisfactory to this court, showing the amounts charged or received by petitioner during each month, pending review, in excess of the charges allowed by said decision and order of the Railroad Commission, and shall file such verified reports and accounts with the court and the Railroad Commission within one week following the month for which such reports and accounts are rendered.

Petitioner shall further offer, without a request or demand therefor, to each of its cash and token patrons, during the effective period of this stay, a nontransferable refund coupon or slip stating that the fare collected exceeds by one cent the fare prescribed by the Railroad Commission, and that the person given such refund coupon or slip will be entitled to a refund in the amount of one cent for each such coupon or slip, in the event said decision and order are affirmed.

Petitioner shall post placards in a conspicuous place in each street car or bus operated by petitioner, which placards shall advise the public of the pendency of the review proceeding, and shall contain in substance the information to be set forth in the refund coupons or slips hereinabove mentioned.

In the event that said decision and order of the Railroad Commission are affirmed, petitioner shall so advise the public by appropriate advertisement of such fact at least once in each of four daily newspapers published in San Francisco, and also by the posting of appropriate placards in each street car or bus operated by petitioner for a period of sixty (60) consecutive days. Said advertisements and placards shall state that refund coupons or slips theretofore issued may be presented at petitioner's offices for refund of the amount charged in excess of the fare prescribed by the Railroad Commission, and such other information as this court may direct.

In the event that this court finally affirms said decision and order of the Railroad Commission, and in the further event that the persons entitled to a refund of the excess

charges collected by petitioner during this review proceeding do not claim all of such excess charges or moneys within six months after final decision of this court, the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereafter prescribe.

Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein.

This court retains jurisdiction to alter, amend, modify or supersede this order, on motion of either party, or on its own motion, as the interests of justice may require.

Dated, March 8, 1944.

Gibson, Chief Justice.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 15th day of January, A. D. 1945.

(Seal) A. V. Haskell, Clerk,
By L. F. White,
Deputy Clerk.

EXHIBIT B

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
S. F. 16,988

Re: Market Street Railway Co.,
vs.
Railroad Commission of the State of California, etc., et al.,

I, A. V. Haskell, Clerk of the Supreme Court, do hereby certify that the deposits made by the Market Street Railway Company, are as follows:

6—$100,000. United States certificates of indebtedness, 7/8%, series H-1945, dated 12/1/44, due 12/1/45.

$875.00, Cashier's check dated 12-8-44, payable to Supreme Court of California.

$1962.93, Cashier's Check dated 12-19-44 payable to Supreme Court of California.

$481.60, Cashier's check made payable to Supreme Court of California, dated 10-16-44.

A. V. Haskell, Clerk,
By I. M. Johnson,
Chief Deputy.

Subscribed and sworn to before me this 15th day of January, 1945.

(Seal) S. C. Shenk,
Deputy Clerk.

EXHIBIT C

CONTRACT
FOR PURCHASE AND ACQUISITION OF
OPERATIVE PROPERTIES OF
MARKET STREET RAILWAY COMPANY

THIS CONTRACT, entered into this 14th day of September, 1944, between CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, first party, hereinafter called "City", and MARKET STREET RAILWAY COMPANY, a California corporation, second party, hereinafter called "Company",

RECITALS:

1. At a special election held in the City and County of San Francisco, State of California, on May 16, 1944, a majority of the qualified voters of City voted to amend the Charter of City by adding thereto a new section numbered 119.1, providing a plan for the purchase and acquisition of the operative properties of Company by City.

2. On June 7, 1944, the Legislature of the State of California, at a special session thereof, approved said amendment, which was filed with the Secretary of State June 9, 1944, and said Section 119.1 became and is now a part of the Charter of City.

3. On July 27, 1944, the Board of Directors of Company authorized by resolution, a copy of which is attached hereto, the sale of the operative properties of Company to City, pursuant to and in the manner set forth in said Section 119.1 of the Charter of City, for the sum of $7,500,000., payable as in said section provided.

4. On August 3, 1944, by vote of the stockholders entitled to exercise more than two-thirds of the voting

power of Company, said stockholders by resolution, a copy of which is attached hereto, approved and consented to the sale of the operative properties of Company to City, pursuant to and in the manner set forth in said Section 119.1 of the Charter of City, for the sum of $7,500,000., payable as in said section provided.

5. The Public Utilities Commission of City, on the advice and approval of the Mayor, has agreed with Company upon the terms and conditions for the purchase and acquisition of said operative properties of Company by City, pursuant to and in the manner set forth in said Section 119.1 of the Charter of City, for the sum of $7,500,000., payable by City to Company as in said section provided.

AGREEMENT:

NOW, THEREFORE, IT IS AGREED as follows:

1. City agrees to purchase and acquire the operative properties of Company, which properties are generally described in a list attached hereto, although said properties are not limited to the descriptions therein contained but shall include all operative properties of Company. Company agrees to sell and transfer to City said operative properties, pursuant to and in accordance with all of the terms and conditions set forth in Section 119.1 of the Charter of City, for the sum of $7,500,000., whereof $2,000,000. shall be paid forthwith from surplus in the funds of the existing Municipal Railway of City, and City is obligated to pay the balance of $5,500,000. out of earnings of the combined operations of the City and Company railway systems or otherwise as provided in said Section 119.1 of the Charter of City. In addition to the annual

payment provided for in Section 119.1 of the Charter, City may make installment payments at any other time at the option of City.

2. Any unpaid balance of said purchase price of $7,500,000. shall bear interest at the rate of four per cent (4%) per annum, payable annually.

3. Said Section 119.1 of the Charter of City as it exists on the date hereof, and not otherwise, is hereby referred to and made a part hereof and a copy attached hereto.

4. On September 29, 1944, at the hour of 5 o'clock A.M. Pacific War Time of said day, all of the operative properties of Company, free and clear of all claims, liens and encumbrances, located in the City and County of San Francisco and in the County of San Mateo, State of California, shall, upon the performance by City and Company of all matters and things required by City and Company to be done and performed by them respectively, and upon the initial payment of said sum of $2,000,000. by City to Company, be transferred to and will thereupon be owned and operated exclusively by City as the property of City, and City will after said hour of 5 o'clock A.M. Pacific War Time of September 29, 1944, assume all obligations of such ownership and operation of said operative properties by City, and Company will at said time be relieved from any and all obligations in connection with the said operative properties and the operation thereof; provided, however, that City does not assume any liability for and will not undertake the defense or payment of claims of any kind or character against Company arising from the ownership or operation of said operative properties by Company prior

to 5 o'clock A.M. Pacific War Time of September 29, 1944, including, but not limiting the same to, damages for injuries to persons, damages for death, injuries to or death of Company employees, and damages to property.

5. At said hour of 5 o'clock A.M. Pacific War Time of September 29, 1944, Company will surrender for cancellation and City will cancel Company's existing operating permit, whereupon all rights, privileges and obligations of Company under and by virtue of said operating permit, or any other franchises, permits or licenses granted by City to Company, shall be terminated and cancelled, and Company shall thereby and thereafter be discharged and relieved from any and all obligations to City thereunder.

6. Upon payment of said $2,000,000. by City to Company and the execution of proper instruments of conveyance, Company agrees to transfer a good and merchantable title to said operative properties, free and clear of all claims, liens and encumbrances of every kind and character as provided in said Section 119.1 of the Charter of City. Taxes due for the fiscal year 1944-45 assessed against all or any part of the real or personal property of Company to be conveyed and transferred to City by Company shall be prorated as of September 29, 1944. All other taxes which are or may be assessed against Company shall be paid by Company.

7. Company shall have access at all reasonable times to the operating and financial records of City applicable to the operation of City's unified street railway system, and shall be furnished with quarter-yearly statements in respect thereto.

8. Payments made to Company shall be accompanied by a written statement of City setting forth the items of revenue, expenses and other deductions entering into the determination by City of the amount of such payment. Such statement shall set forth the result of the operation of the unified street railway system in sufficient detail to enable Company to determine therefrom the amount of net revenue payable to Company for the fiscal year covered by such statement. The rights provided for in this paragraph are in addition to those provided for in Paragraph 7 hereof.

9. City covenants and agrees for the direct benefit of Company and any assignee of Company, until the purchase price of said operative properties shall have been paid in full, including interest on the unpaid balance thereof as follows, to wit:

(a) That upon the acquisition of said operative properties City, by and through its Public Utilities Commission shall manage, control and operate said operative properties as an extension of the existing San Francisco Municipal Railway so as to constitute a unified street railway system and that City will at all times operate said operative properties and maintain the same in good running order and otherwise utilize said operative properties in an efficient and economic manner in accordance with the established operating and business standards and practices of the street railway industry, subject only to breakdown and other causes beyond the control of City;

(b) uniform rates, fares and charges and universal transfer privileges shall be established and maintained by the Public Utilities Commission for said operative

properties and the existing San Francisco Municipal Railway and that except for school children and other special cases, pursuant to which reduced or free transportation now exists in accordance with the existing practice of the Municipal Railway, the regular fare for transportation of passengers on said operative properties and the San Francisco Municipal Railway operated as a unified street railway system in the City and County of San Francisco, shall not be less than 7¢ per passenger until the purchase price of said operative properties shall have been paid in full as provided in Section 119.1 of the Charter; and provided, however, that said fares shall not be increased in excess of 7¢ per passenger except in accordance with the procedure of Section 130 of the Charter;

(c) that City will not make any extensions, radical changes or alterations to said operative properties or abandon any substantial portion thereof except only to the extent that such extensions or abandonments are required by reason of the unification of the operations of said operative properties with those of the Municipal Railway. No change, alteration, extension or abandonment of any of said operative properties shall change, alter or modify the percentages fixed in paragraph 3 of Section 119.1 of the Charter for the purpose of accounting for the revenues derived from the operation of said unified street railway system and all such revenues shall be accounted for as in said paragraph 3 of said Section 119.1 of the Charter provided, irrespective of the manner or method of the operation of said operative properties or any change, alteration or abandonment thereof or substitution of any or additional equipment therefor;

(d) that City and all commissions, boards, officers and employees thereof, shall comply with all the terms

and conditions of this contract and said Section 119.1. All of the covenants of City shall inure to the benefit of and be enforceable by any assignee of Company or any person, firm or corporation to whom the whole or any part of the payments to be received by Company have been or may be assigned and consent to such assignment of the whole or any part of such payments is hereby given. All payments required hereunder to be made to Company shall, in the case of any assignment by Company, be paid direct to the assignee designated in any written assignment executed by Company and filed with the Controller of City. From and after the filing of such written assignment, the assignee shall be entitled to all payments so assigned by Company until the amount stated in such assignment shall have been paid in full. Any such assignment shall, by its terms, be irrevocable upon the filing of the same or duplicate thereof with the Controller of City and no subsequent act of City or Company shall impair the efficacy of such assignment and no act of City or Company shall constitute a defense, legal or equitable, to the payment by City of the amount so assigned to such assignee.

10. Company agrees, when requested to do so by Public Utilities Commission, to assign, transfer and set over to City any and all contracts and agreements that Company may have in effect for the operation and maintenance of Company's operative properties, including but not limiting such assignments and transfers to such contracts and agreements as that certain agreement dated the 28th day of March, 1940, with The General Tire & Rubber Company of Akron, Ohio; Criffin Wheel Company dated 1920 wherein the original purchaser was United Railroads of San Fran-

cisco; the advertising contract with Fielder, Sorensen & Davis; contract for purchase of steel cable from Columbia Steel Company; contract for purchase of Diesel engine oil; and all other contracts or agreements that may be requested to be assigned by Company to City.

IN WITNESS WHEREOF, City and County of San Francisco has executed this agreement and contract, in duplicate, by its duly authorized representatives, and Market Street Railway Company has executed same by its duly authorized officers, and affixed their respective seals thereto.

CITY AND COUNTY OF SAN FRANCISCO,
By Public Utilities Commission of the City and County of San Francisco,

Marshall Dill,
President,

Sam McKee,
Vice-President,

W. I. Kohnke,
Commissioner,

Lloyd J. Cosgrove,
Commissioner,

Daniel F. Del Carlo,
Commissioner,

By R. D. Lapham,
Mayor of the City and County of San Francisco.

Attest:
(Seal) David A. Barry,
Clerk of the Board of Supervisors.

MARKET STREET RAILWAY COMPANY,
By Samuel Kahn,
President.

Attest:
(Seal) James J. Adams,
Secretary.

Approved as to form
9/14/44
Cyril Appel,
General Counsel.

Approved as to form
Jno. J. O'Toole,
City Attorney.

Funds available
_____,
Controller.

Approved
E. G. Cahill,
Manager of Utilities.

SALE OF OPERATIVE PROPERTIES TO CITY AND COUNTY OF SAN FRANCISCO. On motion of Stockholder Appel, duly seconded by Stockholder Fay, the following resolution was adopted:

WHEREAS, on the 27th day of July, 1944, the Board of Directors of the Market Street Railway Company unanimously adopted a resolution authorizing the sale of the operative properties of the Market Street Railway Company to the City and County of San Francisco pursuant to and in the manner set forth in Section 119.1 of the Charter of the City and County of San Francisco for the sum of $7,500,000., payable as provided in said Section 119.1 of said Charter, which resolution is as follows:

"SALE OF OPERATIVE PROPERTIES TO CITY AND COUNTY OF SAN FRANCISCO. On motion of Director McCarthy, duly seconded by Director Ehrman, the following resolution was unanimously adopted:

"WHEREAS, pursuant to the provisions of Section 119.1 of the Charter of the City and County of San Francisco, the City and County of San Francisco is authorized to extend the existing San Francisco Municipal Railway by the acquisition of the operative properties of the Market Street Railway Company and to purchase and acquire said operative properties as therein provided: and

"WHEREAS, the Board of Directors considers that it is for and in the best interests of the Market Street Railway Company and its stockholders that its operative properties be sold to the City and County of San Francisco for the

sum of $7,500,000., payable as provided in said Section 119.1 of the Charter of the City and County of San Francisco;

"NOW, THEREFORE, IT IS RESOLVED: That subject to approval and consent by a vote of the stockholders of the Market Street Railway Company entitled to exercise a majority of the voting power of the Company, the Board of Directors does hereby authorize the sale of the operative properties of the Market Street Railway Company to the City and County of San Francisco pursuant to and in the manner set forth in Section 119.1 of the Charter of the City and County of San Francisco for the sum of $7,500,000., payable as provided in said Section 119.1 of the Charter of the City and County of San Francisco;

"IT IS FURTHER RESOLVED: That, whenever the stockholders of the Market Street Railway Company approve and consent to said sale of said operative properties, pursuant to and in the manner set forth in said Section 119.1 of the Charter of the City and County of San Francisco for the sum of $7,500,000., payable as therein provided, the President and Secretary of the Company are authorized, empowered and directed to execute, in the name and on behalf of the Market Street Railway Company and under its corporate seal, and deliver any and all agreements, contracts, deeds, bills of sale, assignments, transfers, instruments of conveyance, writings and documents necessary to consummate the sale of said operative properties of the Market Street Railway Company to the City and County of San Francisco pursuant to the provisions of said Section 119.1 of the Charter of the City and County of San Francisco."

NOW, THEREFORE, IT IS RESOLVED: That the stockholders of the Market Street Railway Company hereby approve and consent to the sale of the operative properties of Market Street Railway Company to the City and County of San Francisco for the sum of $7,500,000., to be paid as provided in Section 119.1 of the Charter of the City and County of San Francisco.

The vote approving and consenting to said sale of the operative properties of the Market Street Railway Company was as follows:

	Prior Preference	Preferred	Second Preferred	Common	Total
Appel, Cyril				1	1
Adams, James J.				2	2
Boggs, M. H. B.	15	1	3	6	25
Ehrman, Albert L.				1	1
Fay, Philip J.				1	1
Kahn, Samuel				3	3
Newton, L. V.				1	1
Stock represented by proxies in writing given to Harry S. Scott, Philip J. Fay, and Albert L. Ehrman	79,227	43,666	31,809	77,797	232,499
Total Stock Represented	79,242	43,667	31,812	77,812	232,533

The vote against the sale of the operative properties of the Market Street Railway Company was as follows:

	Prior Preference	Preferred	Second Preferred	Common	Total
Singer, W. D.		50	220	1,110	1,380
Stock represented by proxies in writing given to Harry S. Scott, Philip J. Fay, and Albert L. Ehrman	886	1,438	318	845	3,487
Total Stock Represented	886	1,488	538	1,955	4,867

All of the foregoing proxies were filed with the Secretary and examined and approved by the Committee on Proxies prior to the meeting.

I, JAMES J. ADAMS, Secretary of the Market Street Railway Company, hereby certify the above and foregoing to be a full, true and correct copy of a resolution adopted by the stockholders of said Corporation at a special meeting thereof held on August 3, 1944; that there was then and there present and voted thereon a quorum of said stockholders; and that said resolution is in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation this 22nd day of August, 1944.

JAMES J. ADAMS,
Secretary.

EXHIBIT D

AMENDMENT OF CHARTER OF CITY AND COUNTY OF SAN FRANCISCO.

EXTENSION OF MUNICIPAL RAILWAY BY UNIFICATION WITH MARKET STREET RAILWAY.

Section 119.1.

1. The City and County of San Francisco shall have power and is hereby authorized, in addition to all other powers howsoever conferred upon said City and County, to extend the existing San Francisco Municipal Railway by the acquisition of the operative properties of the Market Street Railway Company, hereinafter called "said operative properties", and to acquire said operative properties, thereby supplying said City and County and the inhabitants thereof with a unified street railway system and incidentally furnishing transportation in and to San Mateo County.

2. The adoption of this section shall be deemed to and shall constitute a finding by the people of the City and County of San Francisco that the public interest and necessity demand the extension of the existing Municipal Railway by the acquisition of said operative properties, thereby providing a unified Municipal Railway System for the benefit of said City and County and its inhabitants.

3. Upon the payment in full of the cost of said operative properties, as herein provided, said operative properties shall be consolidated with the present Municipal

Railway and shall become a part thereof and both of said systems so consolidated, and all additions, betterments and improvements thereto, shall constitute the Municipal Railway of the City and County of San Francisco, and shall be subject to all the provisions of this Charter then in effect. Prior to the payment in full, as herein provided, of the cost of said operative properties the same shall be operated by the Public Utilities Commission, hereinafter called "Commission", and the provisions of Sections 74, 127, 128, 128.1, 129 and 130 of this Charter shall not be applicable to said operative properties, the operation thereof, or the revenues derived therefrom, nor shall any other provision of this Charter, inconsistent with the provisions of this Section 119.1, be applicable; provided, however, that said Commission shall nevertheless manage, control and operate said properties as an extension of the Municipal Railway with uniform fares and transfer privileges so as to constitute a unified street railway system.

Prior to the acquisition of said operative properties, the Commission shall submit, and the Mayor shall approve and the Board of Supervisors shall adopt, a budget relating to such unified operation in the same manner and subject to the same conditions except time as provided in the Charter and in this Section 119.1, for the submission and approval of the annual budget, the annual appropriation ordinance and the annual salary ordinance. Provided that such budget and ordinances shall become effective upon such acquisition.

For the purpose of accounting for the revenues derived from the operation of said operative properties prior

to the payment in full of the cost thereof, 57 per cent of the gross revenues of the Municipal Railway and said operative properties shall be deemed to be and shall constitute the revenues applicable to and derived from the operation of said operative properties, and said revenues shall be set aside by the Controller in a special fund, which is hereby created, to be designated "Municipal Railway-Market Street Extension Fund", hereinafter called "extension fund" and shall be held separate and apart from all other moneys in the treasury.

Out of the moneys estimated to be received in said extension fund there shall be appropriated by the Board of Supervisors the amounts recommended by the Commission for the following purposes and in the following order:

(a) The operating expenses of said operative properties, including pension charges and proportionate payments to such compensation and other insurance and accident reserve funds as the Commission may establish or the Board of Supervisors may require in connection with said operative properties. The aggregate amount provided from said extension fund for such requirements in any year shall be 55.96 per cent of the annual cost of all of the operating expenses and above described charges and payments made on account of both the existing Municipal Railway and said operative properties then operated as a unified system;

(b) All amounts provided for repairs and maintenance of said operative properties. The aggregate amount provided from said extension fund for such requirements in

any year shall be 56.49 per cent of the annual cost of repairs and maintenance of both the existing Municipal Railway and said operative properties, then operated as a unified system;

(c) Amounts determined by the Commission to be necessary to create and maintain a reconstruction and replacement fund applicable to said operative properties, not exceeding for the first year after such acquisition $500,000, and not less than $300,000, and in subsequent years, until the purchase price shall have been paid in full, a sum not exceeding $750,000 for the first year and not less than $500,000 per annum thereafter. Any unencumbered balance remaining in said reconstruction and replacement fund at the close of each fiscal year shall become a part of the moneys to be paid to the Market Street Railway Company pursuant to sub-paragraph (d) hereof;

(d) The entire balance remaining in the extension fund which shall be paid to Market Street Railway Company as required by the terms of the purchase contract, but in any event not later than thirty days after the close of the fiscal year of the City and County. It is hereby found and determined that the ratios herein established for gross revenues, operating expenses and other charges and repairs and maintenance of the Municipal Railway and said operative properties represent the exact ratios prevailing between said systems based on a study and report of the Commission which is hereby approved and adopted.

4. All amounts herein required to be paid from the extension fund shall be paid by the Treasurer of the

City and County upon presentation of a Controller's Warrant drawn at the demand of the Commission. It is hereby made the duty of the Commission to make such demand in accordance with the terms of the purchase contract and for the purposes herein provided.

All moneys paid to Market Street Railway Company shall be applied first to the payment of interest on the purchase price and the balance to the unpaid principal of said purchase price. None of the moneys in said special trust fund shall be diverted to any other purpose or used or applied for any other City and County purposes or transferred to any other fund.

5. The provisions of this Section 119.1 shall prevail over any other provision of this Charter or general law, and the method herein provided for the extension of the existing Municipal Railway by acquisition of said operative properties shall be deemed to constitute an additional method of providing for such extension by the acquisition of said operative properties and for the payment of the cost thereof.

Whenever the Commission with the advice and approval of the Mayor, shall agree with the Market Street Railway Company upon the terms and conditions of such acquisition of said operative properties, it shall be the duty of the Commission and the Mayor to execute such contract for and on behalf of the City and County of San Francisco and in its name. Subject only to the provisions of this Section 119.1, such contract may provide, among other things:

(a) That the maximum purchase price shall be $7,500,000, whereof $2,000,000 shall be paid forthwith from

surplus in any of the funds of the existing Municipal Railway derived from earnings of the existing Municipal Railway, which surplus is hereby determined to exist and to be available for, and is hereby appropriated for, said purpose, and the City and County shall be obligated solely to pay the balance of said purchase price exclusively from the moneys in said extension fund, as herein provided. The unpaid balance of said purchase price shall bear interest at the rate of not to exceed four (4) per cent per annum, payable annually.

It is hereby found and determined that after making said initial payment herein provided to be made to Market Street Railway Company there will remain in the funds of the Municipal Railway moneys fully sufficient to pay and discharge all current obligations of the bonds issued by the City and County for the acquisition, construction and completion of said Municipal Railway and all other costs and charges now payable from said funds.

(b) That the title to said operative properties shall be transferred to the City and County upon payment of said $2,000,000 and the execution of proper instruments of conveyance and shall be good and merchantable title free and clear of all claims, liens and encumbrances of every kind and character, whether in favor of the Market Street Railway Company or in favor of any one other than Market Street Railway Company;

(c) That upon the delivery of such instruments of conveyance, Market Street Railway Company shall assign and transfer to the City and County all franchises, permits and licenses of any kind or character necessary or desirable in connection with the operation of said opera-

tive properties, and shall surrender and cancel its existing operating permit, whereupon all rights, privileges and obligations under said operating permit and all other permits and franchises granted by the City and County shall be terminated and canceled;

(d) That uniform rates, fares and charges, and universal transfer privileges shall be established and maintained by the Commission and that except for school children and other special cases pursuant to which reduced or free transportation now exists in accordance with the existing practice of the Municipal Railway, the regular fare for transportation of passengers on said unified street railway system shall not be less than 7 cents per passenger until the purchase price of said operative properties shall have been paid in full as herein provided; and provided, however, that said fares shall not be increased in excess of 7 cents per passenger except in accordance with the procedure of Section 130 of the Charter;

(e) That the City and County of San Francisco and all commissions, boards, officers and employees thereof shall comply with the terms and conditions of said contract and this Section 119.1. Such contract may contain such other terms and conditions not inconsistent with the provisions of this section, as the Commission may deem appropriate for the purpose of carrying out the objects and purposes of this section, including but without being limited to the agreement that the City and County will operate said operative properties and maintain the same in good running order, and otherwise utilize said operative properties in an efficient and economical manner in ac-

cordance with the established operating and business standards and practices of the street railway industry, subject only to breakdown and other causes beyond the control of the City and County; that the City and County will not make any extensions, radical changes or alterations to said operative properties or abandon any substantial portion thereof except only to the extent that such extensions or abandonments are required by reason of the unification of the operations of said operative properties with those of the Municipal Railway. The City and County, however, shall not be obligated to pay any of the costs or expenses provided to be paid under such contract from any source other than said extension fund.

6. Except for the sum of $2,000,000 to be paid Market Street Railway Company as herein provided, the obligation of the City and County to pay the balance of said purchase price, interest thereon, all operating expenses, all other charges of any other kind or character incurred in connection with said operative properties shall be limited exclusively to moneys in said extension fund as herein provided and under no circumstances shall the payment of any part thereof constitute a debt, liability or obligation of the City and County of San Francisco, nor shall the City and County be obligated to pay any part thereof from any moneys derived from the levy or collection of taxes upon the taxable property of the City and County of San Francisco, provided that nothing herein or elsewhere in the Charter contained shall prevent the City and County from paying any part of the balance of said purchase price and interest thereon or any other charges in connection with the operation or

maintenance of said operative properties from any funds of the Municipal Railway appropriated by the Board of Supervisors for that purpose, which said funds the Board of Supervisors may in its discretion appropriate; and in the event of such appropriation the provisions of Section 129 of the Charter, insofar as the revenues of the Municipal Railway are concerned, shall be suspended until the cost of the acquisition of said operative properties is paid in full, and provided further that under no circumstances shall the City and County make such payments from its general funds or from any funds other than as provided by this Section 119.1.

7. The acquisition of said operative properties in the manner herein provided is hereby determined to be and shall constitute an extension and improvement of the existing Municipal Railway.

8. Until the purchase price of said operative properties shall have been paid in full, the Commission is hereby authorized to fix, establish and collect uniform rates, charges and fares for the transportation of persons on both the Municipal Railway and the said operative properties, without regard to Section 130 of the Charter, except as herein provided, and provided that such rates, charges and fares shall not be less than those specified in this Section 119.1. After the purchase price of said operative properties shall have been paid in full all rates, charges and fares for transportation service furnished by the then unified and extended Municipal Railway shall be fixed, established and collected only in accordance with the then existing provisions of the Charter, without regard to this Section 119.1.

EXHIBIT E

"Assembly Concurrent Resolution No. 3

CHAPTER 13

Assembly Concurrent Resolution No. 3—Approving amendments to the Charter of the City and County of San Francisco voted for and ratified by the electors of said city and county at a special election held therein on the sixteenth day of May, 1944.

[Filed with Secretary of State June 9, 1944.]

* * * * *

WHEREAS, The said legislative authority of said city and county ordered placed upon the ballot at a special election to be held in the City and County of San Francisco on the sixteenth day of May, 1944, the said six (6) several proposals to amend the charter of the City and County of San Francisco, and

WHEREAS, Said special election was held in said City and County of San Francisco on the sixteenth day of May, 1944; * * * and

WHEREAS, At said special election so held on the sixteenth day of May, 1944, six (6) of said proposed amendments to the Charter of the City and County of San Francisco were ratified by a majority of the electors of said city and county voting thereon, six (6) being the total number of proposed charter amendments submitted to the electors of said city and county at the special election heretofore referred to, and

WHEREAS, The six (6) charter amendments so ratified by the electors of the City and County of San Francisco

at the special election held on the sixteenth day of May, 1944, are now submitted to the Legislature of the State of California for approval or rejection each as a whole without power of alteration or amendment in accordance with the provisions of Section 8 of Article XI of the Constitution of the State of California, and are in words and figures as follows:

CHARTER AMENDMENT No. 1

[Here follows a copy of the Charter Amendment copied in Exhibit D, supra.]

Now therefore be it

RESOLVED BY THE ASSEMBLY OF THE STATE OF CALIFORNIA, THE SENATE THEREOF CONCURRING, a majority of all the members elected to each house voting therefor and concurring therein, That said amendments to the Charter of the City and County of San Francisco, as proposed to, and adopted and ratified by the electors of said city and county, and as hereinbefore fully set forth, be and the same are hereby approved as a whole without amendment or alteration, for and as amendments to, and as part of the Charter of the City and County of San Francisco."

CALIFORNIA PUBLIC UTILITIES ACT, SECTIONS 35, 36, 37, 42. (Cal. Stats., 1915 p. 115, as amended; Deering's California General Laws, Act [illegible]6.)

§35. UNJUST RULES, ETC., TO BE CHANGED. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed and shall fix the same by its order, rule or regulation. The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

§36. ORDERING OF IMPROVEMENTS. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such

additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order. If the commission orders the erection of a new structure, it may also fix the site thereof. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the commission has ordered to be erected, require joint action by two or more public utilities, the commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at their joint cost, whereupon the said public utilities shall have such reasonable time as the commission may grant within which to agree upon the portion or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

§37. ORDER TO RUN ADDITIONAL CARS, ETC. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for trans-

portation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop the same at proper places, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof, or to make any other order that the commission may determine to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

* * * * * * *

§42. SAFETY DEVICES. The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling, to establish uniform or other standards of construction and equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand.